

STATE CHOICES IN THE GOVERNANCE OF PRIVATE SECURITY PROVISION

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ABSTRACT

Norms and interests have shaped state choices towards the Montreux Document, the only tool to account for new networks and relations between states and markets and the only instrument to address the concern that Private Security Provision operate in a legal vacuum. The neo-liberal norm stirred greater unconstrained use of private security with increased contracting also depending upon other concurring factors. At the domestic level, and particularly in contexts of late state development, choices bear much more upon the varying influence of the anti-mercenary norm.

I distinguish between regulatory politics at the global and state level. I show the content and the unforeseen directions of the anti-mercenary norm, which narrow at the global level but regenerate at the state level. In a competition between the neoliberal norm and the anti-mercenary norm, contingency and crisis favor the neoliberal norm while domestic dynamics of electoral politics and political entrepreneurs stir the anti-mercenary norm.

In the empirical comparison of attitudes and expectations around norms in African states, I help illustrate their approaches to contracting and PMSCs norms. The focus on African states' engagement is justified by the developmental urgency of appropriate standards.

State practice reveals greater agency than expected as well as past pathways of contestation and plausible strategies of extraversion. South Africa alternated between leadership, collaboration and criticism of governance choices. In Nigeria, an engagement with regulatory cooperation represents a reversal of long-standing position. The agency of states can be traced even in post-conflict contexts like Liberia and Sierra Leone with distinctive contributions to prospective regulatory efforts. The international influence of strong states, I argue, can either improve regime creation or indirectly weaken it. Thus, the emergence of a regime for PMSCs norms and recognition of 'PMSC' as an assigned name builds upon the tepid support of strong states- the United States and China, whose influence I examine.

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TABLE OF CONTENTS

List of Tables	ix
List of Abbreviations	x
Preface	xi
Acknowledgments	xii

INTRODUCTION

1. Regulatory cooperation and the governance of private security actors	1
Variation in regulatory choices	3
The African puzzle	4
Two stories	5
2. The complexity of naming	5
Who is it that can tell me who I am?	5
PMSC as a permanent inherited patronym	6
3. Approach and Aims	9
Disciplinary choices	9
Research design	12
Norms in PMSCs governance	14
Norms (II): Defining mercenary and anti-mercenary norm	16
Norms (III): Content and direction of the anti-mercenary norm	16
Norms (IV): Theoretical expectations on the anti-mercenary norm	17
Interests	18
Institutions	20
Case study method	22
Case selection	24
Data and interviews	27

PREAMBLE

Elements of Political Economy	30
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PART I: IDEAS, INTERESTS AND INSTITUTIONS

Chapter 1 The Swiss Initiative	40
Section 1.1 Content and significance	40
Section 1.2 Origins	44
Subsection 1.2.1 Actors	45
Subsection 1.2.1 Norms: first stage of the Initiative	46
Subsection 1.2.3 Second stage of the Initiative	48
International Aspirations	
Swiss domestic politics	

Final stage: Montreux and the ICoC

Section 1.3 Argument in historical perspective	52
Subsection 1.3.1 The Soft Power of institutions	52
Subsection 1.3.2 Neutrality in Comparative perspective	54
Subsection 1.3.3 Neutrality in Action: Between Pro and Anti-Americanism	56
ICRC under attack	
Ambiguities and risks for ICRC	
Conclusion	63
Chapter 2 The United Nations as actor of governance	60
Section 2.1 U.N Practices and Policies	60
Subsection 2.1.1. Evolution of practices	60
Demand for African security crisis	
Limits to the expansion of peacekeeping	
Subsection 2.1.2. Policy development for operations	62
Section 2.2 U.N. as Law-Maker	64
Subsection 2.2.1. How the anti-mercenary norm is still influential	66
Subsection 2.2.2. Transition	71
Subsection 2.2.3. Norm on the Monopoly of Violence	80
Section 2.3 Organizational contingencies	81
Section 2.4 the Draft Convention	82
Subsection 2.4.1. Origins and aims	83
Subsection 2.4.2. Draft Convention and Montreux	83
Subsection 2.4.3. Prospects and Challenges for the Draft Convention	85
Conclusion	86

PART II: FUNCTIONING OF REGIME COMPLEXITY

Chapter 3 Testing PMSC norms	92
Section 3.1 Montreux +5	92
Subsection 3.1.1 Case Selection	92
Section 3.2 Attitudes and Expectations	94
Section 3.3 Implementation of Reforms	92
Conclusion	99
Chapter 4 Designing institutions: The role of the State in Voluntary Regulation	101
Section 4.1 Potential of Voluntary regulation	102
Subsection 4.1.1 Three Innovations	101

Section 4.2 Challenges of implementation	105
Section 4.3 State behaviour	107
Subsection 4.3.1 Variation in Costs of Forum Shopping	107
Box: the ISO standards	
Subsection 4.3.2 Proliferation of Standards	110
Conclusion	110

PART III: BOUNDARIES OF REGIME CONSTRUCTION

Preamble: Regulatory cooperation in Africa

Relevance of IR, Norms and Regime for Africa	114
Evolution of the anti-mercenary norm	118
PMSCs in Africa	119
Chinese PMSCs: Origins and significance	122

Chapter 5 Contestation or Accommodation 126

Section 5.1 What do we mean by Foreign Enlistment or T.C.N.	126
Section 5.2 Explanations of Foreign Enlistment.	128
Subsection 5.2.1 What aggravated the anti-mercenary norm	129
Subsection 5.2.2 Domestic reverberation of the Wonka coup	130
Subsection 5.2.3 Iraq War: effect of Foreign enlistment on the anti-mercenary norm	131
Subsection 5.2.4 Other factors	132
Section 5.3 Accommodation with Montreux: Uganda's strategy of extraversion	133
Conclusion	136

Chapter 6 Nigeria' Engagement 138

Section 6.1 Context	138
Section 6.2 STTEP and the problem of definitions.	139
Section 6.3 Changing Threats: Tracing Policy decisions.	141
Section 6.4 Elaborating a New Framework.	146
Subsection 6.4.1 Relevance of Montreux for Nigeria.	147
Conclusion	149

Chapter 7 State and Non-State choices in Liberia 151

Section 7.1 Preamble	151
Subsection 7.1.1 Theoretical expectations and puzzle	154
Section 7.2 PMSCs building the army of Liberia.	155
Subsection 7.2.1 Argument for External Influence	155

Section 7.3 Liberia and Montreux. _____	159
Section 7.4 Liberian Entity as policy entrepreneur. _____	160
Subsection 7.4.1 Piracy in the Horn _____	154
Subsection 7.4.2 From the SS World Peace to the LISCRC _____	162
Subsection 7.4.3 LISCRC and armed security on board _____	163
Subsection 7.4.4 IMO Guidelines _____	167
Conclusion _____	169
 Chapter 8 Sierra Leone: Continuity and change _____	 171
Section 8.1 A Source of Practice. _____	171
Section 8.2 Maritime Security. _____	174
Section 8.3 Sierra Leone and the Ebola Virus Disease _____	176
Subsection 8.3.1 Typical post-disaster challenges in territorial states _____	177
Subsection 8.3.2 The EVD and the response of the state _____	178
Subsection 8.3.3 The Emergency regulations: State authority and the Public-Private Assemblages _____	179
Conclusion _____	182
 Chapter 9 Ideas, Interests and External Influence _____	 183
Section 9.1 Choices and preferences in regime formation _____	183
Section 9.2 Varying influence of the anti-mercenary norm _____	185
Section 9.3 Tensions between anti-mercenary norm and human rights norms _____	188
Subsection 9.3.1 Madagascar _____	189
Subsection 9.3.2 Challenges to this approach _____	191
Section 9.4 Challenge to PMSC norms? the Chinese perspective _____	195
Subsection 9.5.3 Chinese participation to Montreux and the U.N. debates _____	197
 Chapter 10 Future Research _____	 202
Section 10.1 The Disparities of Trade Dependence _____	203
Subsection 10.1.1 Background and Significance _____	203
Subsection 10.1.2 Three arguments _____	204
Subsection 10.1.3 Sources of international leverage and the AGOA negotiations _____	209
Section 10.2 Labor policy _____	211
Subsection 10.2.2 Drivers of mobilization and violent action _____	212
Subsection 10.2.2 Contingency _____	213
 Conclusion _____	 216
 Bibliography _____	 223

Appendices	241
Appendix A. Montreux Document endorsements, list of countries	
Appendix B. Letter U.S. Senate to South African Ambassador	
Appendix C. List of Main Interviews	
Author Curriculum Vitae	247

List of Tables

Table A Three Dimensions of Regulatory Cooperation	13
Table B Political Economy of Private Security in Africa	32
Table C Regulatory cooperation in Africa: Case studies	114
Table 1 Externalities in historical perspective	44
Table 2 Definition of Mercenary. Geneva Convention, Art. 47 and U.N. Convention	69
Table 3 Evolution of definitions within the United Nations, 1989-2010	76
Table 4 Spectrum of services and identified prohibitions under Montreux and UN Convention	84
Table 5 Montreux Document, Implementation, 2008-2013	97
Table 6 Future of standards	110
Table 7 Recent instances of mercenarism	141
Table 8 Violence and fatalities in Nigeria (Nigeria Social Violence Project)	146

List of Abbreviations/Acronyms

AGOA African Growth and Opportunities Act

AU African Union

AFRICOM United States Africa Command

DCAF Democratic Control of Armed Forces

EVD Ebola Virus Disease

GA General Assembly

HRC Human Rights Council

IHRL International Human Rights Law

IHL International Humanitarian Law

IMO International Maritime Organization

ICoC International Code of Conduct

ICoCA International Code of Conduct Association

ICRC International Committee of the Red Cross

PMSC Private Security and Military Companies

SC Security Council

SIA Security Industry Association

SSR Security Sector Reform

VP Voluntary Principles of Security and Human Rights

UN United Nations

Preface

Portions of the research and analysis presented in Part III were previously published in a different form.

Part of chapter 8 was published in DeWinter-Schmitt, R. (Ed) Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices, available at <http://ihrib.org/wpcontent/uploads/2013/12/MontreuxFv3.pdf>

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This research interest on PMSCs grew out of my experience in humanitarian affairs and initial research in the Central African Republic in 2007 with the help of the late Bill Foltz, and the friendship of faculty at Yale. The work continued with the support of Bob Bates and his team at Harvard. Cambridge left me several lifelong friends, including Konrad Lawson who was the first to read the whole manuscript.

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INTRODUCTION

1. Regulatory cooperation and the governance of private security actors

The proliferation and influence of private security is often hailed as one of the most significant changes in international politics- from the privatization of foreign policy to the ethics of contracting, from the effectiveness of companies to the tensions between private contractors and government military personnel. As Abrahamsen and Williams wrote, the state's much-vaunted monopoly of legitimate force is increasingly enmeshed in networks and relations that cannot always be contained within the boundaries of the national state.

What is private security? Let us start with some definitions. "PMSCs" or Private Military and Security Companies are private business entities that provide military and/or security services, irrespective of how they describe themselves. *Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.*¹ Thus, the primary business of PMSCs is not the production and procurement of hardware, typical of the defense industry, but the procurement and delivery of services both in peace and in conflict zones.

The use of PMSCs is not problematic *per se* and there is no evidence that contractors are more likely to misbehave than national soldiers or police forces. However, they can, like their public

¹ This is the definition in the Montreux Document, p.9. Also cf. chapter 1

counterparts, engage in harmful or inappropriate behavior. First, PMSCs could impinge on *states' rights and obligations*. A security firm that operates in tasks that are inherently governmental could infringe on the basic nature of states' claim to a monopoly of the legitimate use of force, creating externalities for states.² Second, international law does not require that security be provided by public entities but the provision of security services may imply use of force, thus raising the possibility to violate *human rights*, particularly when there is an absence of adequate control and oversight or where accountability structures are weak or inexistent.”³ If the contractors' human rights abuses or criminal misconduct cannot be resolved, prevented or remedied, the argument goes that PMSCs work in a realm of impunity.⁴

Having recognized the lack of a framework for PMSCs activities, states engaged in multiple initiatives: the Montreux Document (hereinafter Montreux or the Document) and the International Code of Conduct (hereinafter ICoC or the Code), the United Nations Draft Convention; as well as national legislations governing PMSCs.

The politics of private security governance is not explained by conventional theories that claim that global issues and policies reflect the underlying military and economic capabilities. Reflecting the realist tradition in international relations, analysts find it difficult to explain how regulation evolved in spite of conflicting national interests and cannot explain the involvement of states that had no strategic interest in cooperation.⁵ The assumptions on the nature of the state elude the complexity of bureaucratic politics.

² cf. Chapter 1; pp. 42-44

³ B. Buckland and T. Winkler, *Public Private Cooperation: Challenges and Opportunities in Security Governance*, Geneva Center for the Democratic Control of Armed Forces (DCAF), Horizon 2015 Working Paper No. 2 (2010), at 10.

⁴ If some of these abuses cannot be resolved in principle, then there is an underlying impunity, i.e. immunity. This phenomena refers to *Status of Forces Agreement*

⁵ The United States in D. Avant, forthcoming

Yet, constructivist approaches are challenged as well. Assuming the existence of PMSCs norms, which cannot be said to be determinants of state behavior nor can they be shown to be global and proscriptive social norms- would be simplistic. There is a thus gap in our understanding of the relation of PMSCs norms to the anti-mercenary norm and their varying influence on state and inter-state policy making. Which body of norms guide states in their relations to PMSCs? What remains of the influence of the anti-mercenary norm? Is reformulated and limited? Are there alternative accepted PMSCs norms? At the state level, what are the political conditions that foster regulatory cooperation? Vice versa, what shapes severe regulatory responses to PMSCs, including ban?

Variation in regulatory choices

These questions are animated by the extraordinary variation in regulatory choices in the last decade. While some governments allowed PMSCs, others banned them altogether. In maritime security, several countries have changed policy recommendation almost overnight, from strongly advising against private security, to recommending their use. In Spain, the government chose to authorize and subsidize the fishing industry's use of PMSCs. The largest Iranian tanker operators, as well as Chinese shipping firms, now use PMSC services for their fleet. In the last decade a more permissive environment has developed and the United Nations specialized body, the I.M.O., has acknowledged the situation and issued guidance to organize the practice. However, how can we then account for heterogeneity in state choices and what explain shift? And why do they occur when they do?

Second, cooperation in this realm poses a distinct puzzle in terms of the definition of the actors. The tractability of the issue-area necessitated a disassociation from the categories of mercenarism and privateering and to a large degree, regulatory cooperation still consists in facilitating the acceptance of the term PMSC, the invention of which I see as akin to a ‘permanent inherited patronym’.

The African puzzle

A lack of African participation developed both at the level of conception (2005-2008) and then, during the implementation stage, in the first seven years (2008-2015). PMSCs built the army of Liberia and Chinese PMSCs work in Sudan; yet, these African states did not endorse Montreux.

The puzzle of state preferences in the developing world and in Africa⁶ it is particularly problematic. While most African states either use or warrant the use of private security within their borders, they mostly ignore the Montreux Document, the central international tool for regulation that recalls the pertinent international legal obligations and good practices for States⁷. Given the earlier role of African states in shaping international law in the closely related field of anti-mercenary conventions and given that the Montreux Document, the main initiative, builds upon them, it is even more perplexing that African states ignore Montreux and PMSC governance. Neither did African states have put forward an alternative continental governance framework.

⁶ I refer to African subcontinent throughout the dissertation

⁷ Chapter 1 is devoted to the Montreux Document, the result of a joint initiative by Switzerland and the International Committee of the Red Cross (ICRC) launched in 2006, which recalls existing obligations of States, PMSCs and their personnel under international law whenever PMSCs are present during armed conflict.

Two Stories

Two stories exemplify the problems and give substance to the puzzle I have outlined. First, in a much-publicized article, *Nigeria's Election: Brought To You By These Hired Guns*, a South Africa firm helped the Nigerian army and an international coalition in the fight against Boko Haram. Thus, the company worked in a legal vacuum. Nigeria did not sign the Montreux Document, the only international tool that poses a framework of accountability for PMSCs. Why have Nigerian policymakers reversed their course and what explains the rapprochement and engagement with the Document?⁸

Another useful story is about Angola, a country that did endorse Montreux. In the recent “Blood Diamonds: Torture and Corruption in Angola,” advocate and activist Rafael Marquez recounts hundreds of cases of torture and killings that took place in a diamond-mining district in Angola. The abuses were partly carried out by guards from a private security firm⁹ and took place before and after the endorsement of the Document by Angola. What is the political commitment to Montreux of signatory African states like Angola? How can regulatory cooperation help foster the emergence of PMSCs norms?

2. The Complexity of Naming

“Who is it that can tell me who I am?”

⁸ Cf. Chap. 6, based on my interviews

⁹ Email Correspondence with the author. The abuses were carried out by guards from a private security firm, Teleservice, and by members of the Angolan Armed Forces. Marques de Morais later brought the charge against the generals on the basis of testimonies about torture and killings that were presented in his book. Nine generals are the owners of the private security company Teleservice and the diamond mining company Lumanhe, which is part of the mining consortium Sociedade Mineira do Cuango (SMC)

The analysis begins by laying the foundations: identifying the actors, and choosing the appropriate terms. In the course of my interviews, a former Ambassador, now working for a major PMSC, claimed. “We are a technology company”.¹⁰ In a similar vein, De Nevers recalled the following episode that involves AFRICOM’s first Commander. *He stated in January 2010 that AFRICOM does not use “private military contractors”.* De Nevers continues: “It is important to note, however, that many of the companies contracting with AFRICOM fall within the broad rubric of PMSCs.”¹¹

These episodes reflect the reticence in the use of the term Private Security and Military Company, which is the consequence of the interplay of variables rooted in the variation in states’ choices. It is indeed not a coincidence that *all studies and accounts of PMSCs begin with the problem of simple definition, as Carmola writes, that they are ambiguous or polymorphous entities— a mix of old and new, public and private; slippery, and hard to pin down analytically.*¹²

PMSC as a permanent inherited patronym

The byzantine complexity of names used to be a formidable obstacle to understanding society until the invention of **permanent inherited patronyms** established a precondition of statecraft¹³. The development of the modern state coincided with a process of standardization and classification; the ability of the state to plan and administer was based on its capacity to measure and assess complex social dynamics.

¹⁰ Author interviews, Washington DC, September 2014. I inquired about her firm participation to the private security regulation process

¹¹ De Nevers in Kinsey and Patterson (eds.) *Contractors and War: The Transformation of United States Expeditionary Operations* (Stanford Security Studies) (p. 71). Stanford University Press. Kindle Edition.

¹² Carmola, Kateri (2010-02-05). Private Security Contractors and New Wars: Risk, Law, and Ethics (Contemporary Security Studies) (p. 9). She cites: Avant 2005: 22; Singer 2003: 40; Alexandra et al. 2008: 7; Chesterman and Lehnardt 2007: 3. Taylor and Francis. Kindle Edition.

¹³ James Scott, *Seeing like a State*, ch.2

The analogy helps frame a fundamental problem of imposing patronyms onto the contemporary byzantine public-private nexus. Firms used to be nameless until the rise of the term PMSCs. Like pre-modern citizens, they did not have a permanent patronym until the Montreux Document.

This analogy to the development of the modern state is particularly useful because the analogy of modern contractors to the military enterprisers of the late Middle Ages is often used. Indeed, before the rise of the nation-state, nearly all force was contracted. Fighting wars, maintaining order, and collecting taxes were among the various political tasks filled by these military enterprises.

The complex identity of these firms, which Carmola describes as protean *mix of organizational cultures that represents a new type of international actor and resists governance*¹⁴ leads few firms to unambiguously accept the categorization. Blackwater, probably the most notorious of all the PMSCs, has changed its name twice and now defines itself as an ‘elite security services provider’, not a PMSC.¹⁵ Scholars have noted PMSCs exercising ‘epistemic power’, meaning they have an ability to shape security discourses by setting agendas or maintaining the terms to frame issues.¹⁶ However, the Montreux Document definition attests, “PMSCs are private business entities that provide military and/or security services, *irrespective* of how they describe themselves.

After the Montreux Document was endorsed, a re-naming away from the term PMSCs coincided with new terms- such as “Complex operations firms” or “Stability operations

¹⁴ Carmola, Kateri (2010-02-05). Private Security Contractors and New Wars: Risk, Law, and Ethics (Contemporary Security Studies) (p. 6). Taylor and Francis. Kindle Edition

¹⁵ <https://www.academi.com/pages/about-us> Accessed October 2015

¹⁶ Leander; Bigo

companies” becoming increasingly common. One firm calls itself a “stability operations company that offers global services to the public and private sector in munitions response; logistics; communications; life support services; risk management; and security”. The effort to uniformly use the term PMSC- and attempt to create order in the international system- remains contested.

Yet, the use of PMSCs is supported by a vast academic scholarship¹⁷. Agreement on definitions, a point to which I return in chapter three, is the first focal point for regime development¹⁸. The absence of recognized name and an insufficient traceability of identity lead to an array of problems akin to “anonymous incorporation” and frequently associated to corporate misconduct in general.¹⁹

Another instance underscore the need for an established patronym. While a multitude of measures and indicators are increasingly used to evaluate complex social practices, none exists for PMSCs. Greater emphasis on social accountability spurred new tools for administrative accountability, anticorruption, citizen engagement, governance, social and political accountability. In international relations, the tools for statecraft have increased in the last two

¹⁷ Avant (2005), Percy (2007), Carmola 2011; Dunigan and Petersohn (2015); De Nevers (2011); Kinsey and Cusumano (2012); Pattison (2014). In line with this scholarship, I use the same term in this dissertation.

¹⁸ Focal points have been used by regime theory before and particularly in international security research. Schelling defines a point or equilibrium as *focal* if it has some features that for reasons of psychology, history, or culture, draws attention to itself, making it “stand out” among all equilibria. Schelling, *Strategy of Conflict*, chap. 4, is cited widely in regime theory. See, for ex., Young, in Krasner, pp. 96-98. Young, Oran R. "Regime dynamics: the rise and fall of international regimes." *International Organization* 36.02 (1982): 277-297. Axelrod, Robert, and Robert O. Keohane. "Achieving cooperation under anarchy: Strategies and institutions." *World politics* 38.01 (1985): 226-254. Or Stein, Arthur A. "Coordination and collaboration: regimes in an anarchic world." *International Organization* 36.02 (1982): 299-324. He writes *precommitment has been variously described as the power to bind, as imperfect rationality, and as economics; see Thomas C. Schelling, The Strategy of Conflict, pp. 22-28; ... Such a formulation of prior agreement on principles does not require John Rawls's veil of ignorance; see A Theory of Justice* (Cambridge: Harvard University Press, 1971). Focal points have analogues in other research traditions although without implicit reference to security. Regulatory politics approaches stress the importance of finding the key large-scale event with costly externalities that had mobilizing consequences (Mattli and Woods). The logic of focal points is also very similar to what is used in historical institutional analyses that emphasize the enduring impact of choices made during *critical junctures*. However, historical institutionalism departs from scholars of global regulation in the choice of the unit of analysis, which can range from *a single organization to the structured interaction between organizations (for example, a party system or relationships between branches of government), to public policies, to a political regime as a whole*. Cf. Capoccia and Keleman, *The Study of Critical Junctures, World Politics*, 59 (April 2007), 341-69.

¹⁹ On the issue of anonymous incorporation on the international market, cf. Findley, Nielsen and Sharman 2014. It is the first experimental research on the behavior of so-called shell companies.

decades with the global proliferation of ratings and rankings²⁰, but in private security policy, there is no indicator.²¹ The recent absence of mention of the use of contractors in implementing the strategy to destroy the Islamic State is an expression of this trend.²² Thus, there is an imbalance between the growing importance of private security and the insufficient interface with modern tools of accountability.

3. Approach and Aims

My contribution is largely based on three bodies of literature: the literature on private security contractors, the literature on regime theory and the politics of regulation, and the African studies literature.

The literature of private security contractors has developed in isolation from the developments in regime theory, the literature on the politics of regulation, and the international and comparative political economy. A scholarship on military contracting has concentrated overwhelmingly on the United States and, to a lesser extent, the United Kingdom, and focused

²⁰ Cooley and Snyder, *Ranking the World*, 2015 (Cambridge University Press); Arndt, The politics of governance ratings, *International Public Management Journal*, 2008

²¹ The *Private Security Monitor* based at the University of Denver provides the first available source of data- and an outstanding resource- but no gauge. Available at www.psm.du.edu

²² Bruneau, Thomas. "Impediments to Fighting the Islamic State: Private Contractors and US Strategy." *Journal of Strategic Studies* (2015): 1-24.

on Iraq or Afghanistan, adding important case studies²³. An international legal analysis of private contractors has developed.²⁴

The subject is indeed vast with themes that include the level of corruption within private contractor activity²⁵; the effectiveness and savings (or lack thereof) associated with contracting; private contractors' loyalty; the tensions between private contractors and government military personnel²⁶; the privatization of foreign policy²⁷; or the issue of ethics of contracting and just war theory.²⁸

The literature of private security contractors in Africa has built upon the seminal work of Abrahmsen and Williams.²⁹ Borrowing the concept of disassembly of the state and the emergence of global assemblages, the authors coined the term public private security *assemblages* to show how embedded institutional structures surrounding the legitimate organization of violence potentially disrupt prevailing institutional logic and structures of sovereignty. Other

²³ For examinations of contractors in Iraq and Afghanistan, there is a long list. Here are only few of the most prominent: Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*. (New York: Nation Books, 2008); Christopher Kinsey, *Corporate soldiers and international security: the rise of private military companies* (London ; New York : Routledge, 2006); Gerry Schumacher and Steve Gansen, *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq* (St Paul: Zenith Press, 2006); David Isenberg, *Shadow force : private security contractors in Iraq*. (Westport, Conn., Praeger Security International, 2009); James Jay Carafano, *Private sector, public wars : contractors in combat-Afghanistan, Iraq, and future conflicts* (Westport, Conn. : Praeger Security International, 2008); Rolf Uesseler, *Servants of war : private military corporations and the profit of conflict* (Brooklyn : Soft Skull Press, 2008)

²⁴ Some of the most notable works are: Simon Chesterman and Chia Lehnardt (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Contractors* (2007); Francesco Francioni and Natalino Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011); Christine Bakker and Mirko Sossai (eds.), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* (2012). Laura A. Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs*, Yale University Press, 2011. Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, 2011

²⁵ Cf. The Commission on Wartime Contracting's final report *Transforming Wartime Contracting: Controlling costs, reducing risks*, of August 2011, states that at least \$31 billion, and possibly as much as \$60 billion has been lost to contract waste and fraud in Iraq and Afghanistan. The Final Report to Congress of the Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling costs, reducing risks* Aug. 2011 is available at <www.wartimecontracting.gov.> Accessed October 15 2015

²⁶ Cf. Dunigan, Op. Cit.

²⁷ Stanger, Allison. *One nation under contract: The outsourcing of American power and the future of foreign policy*. Yale University Press, 2014.

²⁸ An updated literature review of this sub-field can be found in Fitzsimmons, S. "Just war theory and private security companies." *International Affairs* 91.5 (2015): 1069-1084.

²⁹ Abrahamsen, Rita, and Michael C. Williams. *Security beyond the state: Private security in international politics*. Cambridge University Press, 2010.

important studies have appeared;³⁰ but none has focused on regulatory cooperation and the formation of state choices.

Next, I rely on the regime theory literature and the literature on the politics of regulation. The latter provides a useful framework to think about outcomes that favor narrow interests and others that achieve wider public purposes.³¹ The regime literature is particularly important for several reasons, one being that it is often taken for granted by legal studies on PMSCs that take regimes and IR literature for granted.³² The regime literature came to be viewed as an experiment in reconciling the idealist and realist traditions (Haggard and Simmons 1987) and the notion of regime was thought as “likely to become a lasting element in the theory of international relations” (Puchala and Hopkins 1982). In the nineties, research on international regimes moved from formation and change to effectiveness – i.e., to whether regimes contribute to the reduction or solution of the problems they address (Stokke 2001). A literature on regime effectiveness emerged and showed the usefulness in the use of regime to bring about cooperation with quantitative studies (Underdal and Young 2002; Young 2011).

In regime theory, the wisdom is that reaching an agreement is a stage in the negotiation, not the end of the process, as Spector and Zartman write.³³ International regimes develop in three general ways: through coercion, convergence, or mutual state choice. Under external pressure,

³⁰ Gumedze, S. "From market for force to market for peace: private military and security companies in peacekeeping operations." *Institute for Security Studies Monographs* 183 (2011); McFate, Sean. *The Modern Mercenary: Private Armies and What They Mean for World Order*. Oxford University Press, 2015.; Varin, Caroline. *Mercenaries, Hybrid Armies and National Security: Private Soldiers and the State in the 21st Century*. Routledge, 2014.

³¹ Mattli, Walter, and Ngaire Woods. *The politics of global regulation*. Princeton University Press, 2009. The condition that favor the latter are an open and transparent process as well as demand-side conditions, information – or demonstration effects, that show to the public the effect of poor regulation and trigger a demand for improvements- converging interests, and a shared set of ideas. In some instances, “demonstration effects” associated with perception of policy failure, creates a demand for new regulatory vehicles. In these instances, new policy entrepreneurs through a process of conflict and cooperation persuade a large number of firms to accept non-state regulatory standards. In Vogel, D. in Mattli and Woods, Op. Cit., Ch. 5

³² Dickinson, Laura A. "Regulating the Privatized Security Industry: The Promise of Public/Private Governance." *Emory LJ* 63 (2013): 417.

³³ Spector, Bertram Irwin, and I. William Zartman. *Getting it done: postagreement negotiation and international regimes*. US Institute of Peace Press, 2003

reluctant governments may be forced to enter agreements but in the majority of cases, regimes arise through explicit state choices to cooperate; this occurs when preferences shift over time.³⁴

When the underlying determinants of preferences change, non-cooperative governments may become more favorable to international regulation. Hence, I note, the importance of studying and explaining state choices where cooperation is either not achieved or not reached in full.³⁵

Finally, the literature on African studies is one where the very notion of ‘African state’ contrasts with the traditional theories of statehood and state creation. The most distinctively “African contribution to human history could be said to have been precisely the civilized art of living fairly peaceably together not in states”³⁶. I rely on a literature whose relationship with the International Relations discipline has been marked by the dominance of perspectives in IR that have sometimes dismissed Africa as a weak and marginal continent with long-standing dynamics of dependence. My use of IR concepts, like regime, globalization, or sovereignty recognizes the tensions and at the same time, assumes a level of agency within Africa and African states.³⁷

Research Design

³⁴ Raustiala 1997. I define preferences as in Moravcsik: “causally independent of the strategies of other actors and, therefore, prior to specific interstate political interactions, including external threats, incentives, manipulation of information, or other tactics”. Moravcsik, Andrew. “Taking preferences seriously: A liberal theory of international politics.” *International organization* 51.04 (1997): 513-553. Whenever I the conditions do not warrant the use of ‘preferences’, I use ‘state choice’

³⁵ Raustiala 1997; Legro 1995

³⁶ Lonsdale ‘States and social processes in Africa’, p.139 in Bayart, *The State in Africa*

³⁷ See Part III, *Preamble*, Relevance of IR, norms and regime for Africa. My use of ‘extraversion’ refer to the classic works such as Patrick Chabal and Jean-Pascal Daloz, *Africa Works: The political instrumentalization of disorder* (Indiana University Press, Bloomington, IN, 1999); Jean-Francois Bayart, *L’État en Afrique: la politique du ventre* (Fayard, Paris, 1989); Christopher Clapham, *Africa and the International System: The politics of state survival* (Cambridge University Press, Cambridge, 1996). My assumptions on the politics of reform and political economy of development, rely on Lewis, Peter. *Growing apart: Oil, politics, and economic change in Indonesia and Nigeria*. University of Michigan Press, 2009. Van de Walle, Nicolas. *African economies and the politics of permanent crisis, 1979-1999*. Cambridge University Press, 2001.

My research strategy is to seek to explain what drives the mosaic of regulatory cooperation by using a framework- rather than a theory or a model- that is consistent with a rationalist approach and that articulate the interests, ideas and institutions that drive preferences at the state and inter-state level.

I privilege the study of agency at the *state-level*, but I also aim at understanding the processes whereby states pick among the available options, and how countries “choose” to exercise their agency depends upon concomitant *international* choices. These international causes have domestic effects- which Gourevitch called the ‘second image reversed’.³⁸

I specify international regulatory cooperation as the dependent variable and I define it is the formal activity that comprises agenda setting, negotiation, implementation, monitoring, and enforcement³⁹, a broad field that I divide into three main areas, two international and one national, as illustrated in the table below.

³⁸ Gourevitch, Peter. "The second image reversed: the international sources of domestic politics." *International Organization* 32.04 (1978): 881-912.

³⁹ Mattli and Woods 2011

Table A: Dimensions of Regulatory Cooperation

Independent variables (IV)	Outcome (DV)	Three Dimensions
Interests, Ideas, Institutions	International Regulatory Cooperation	<p>1. Agenda-setting, negotiation, implementation, monitoring, and enforcement of the Swiss Initiative (Montreux Document and ICoC)</p> <p>2. Agenda-setting and negotiation of U.N. Draft Convention;</p> <p>3. Agenda-setting, negotiation, implementation of national legislations governing PMSCs and their activities</p>

The first element of regulatory cooperation is the Montreux Document, and the related International Code of Conduct for Private Security Service Providers. The second is the input and participation to the U.N. initiative, which led to the elaboration of the Convention on Private Military and Security Companies. Thirdly, as states increasingly seek to regulate internationally, domestic institutions and anticipated implementation have been expected to play greater roles in explaining state choice.⁴⁰ Thus, the relevant domestic regulation that pertains to private security deserves to be included in international regulatory cooperation;

⁴⁰ Raustiala, Kal. "Domestic institutions and international regulatory cooperation: comparative responses to the Convention on Biological Diversity." *World Politics* 49.04 (1997): 482-509. And, he adds, because powerful states are equally influenced by these dynamics, in explaining international outcomes

international standards must eventually lead to domestic changes, and greater state control, because regulatory enforcement is most likely to occur at the state level.⁴¹

Norms in PMSC governance

Realists argue that norms are not inherently influential, and claim that they are a 'reflection of the distribution of power in the world. They are based on the self-interested calculation of great powers and they have no independent effect on state behavior'.⁴² Neoliberals give more weight to the idea that norms shape state behavior. They argue that norms are influential in that they 'not only reflect, but also affect, the facts of world politics'.⁴³ Norms influence policy by providing 'road maps that increase actors' clarity about goals or ends-means relationships, they affect outcomes of strategic situations in which there is no unique equilibrium, and they become embedded in political institutions'.⁴⁴

In this perspective, norms may be regulatory (specifying standards of appropriate behavior) or constitutive (defining the identities of actors).⁴⁵ As they take hold, constitutive norms influence identities and interests.⁴⁶ *Shared ideas and norms, too, exercise power over national leaders by galvanizing new social groups domestically and transnationally and convincing publics of the value of new goals and policies.*⁴⁷

⁴¹ Holmqvist, *Private Security Companies*, 50; and Schreier and Caparini, *Privatising Security*, 104–16. Tonkin, Hannah. *State control over private military and security companies in armed conflict*. Vol. 84. Cambridge University Press, 2011

⁴² Mearsheimer 1994:5-7

⁴³ Keohane 1984: 57. Also cf. Moravcsik, Op. Cit.

⁴⁴ Goldstein and Keohane (1993:3)

⁴⁵ Katzenstein, 'Introduction: alternative perspectives', p. 5; Finnemore, Martha, and Kathryn Sikkink. "International norm dynamics and political change." *International organization* 52.04 (1998). pp. 891–2

⁴⁶ Klotz, Audie. "Protesting Prejudice: Apartheid and the Politics of Norms in International Relations." *Ithaca, NY* (1995).; Cortell, Andrew P., and James W. Davis Jr. "How do international institutions matter? The domestic impact of international rules and norms." *International Studies Quarterly* (1996): 451-478.

⁴⁷ Finnemore, Martha, and Judith Goldstein. "Power Politics in the Contemporary World." *Back to Basics: State Power in a Contemporary World* (2013): 18.

In defining *private business entities that provide military and/or security services, irrespective of how they describe themselves*, the Montreux Document aims at being constitutive.

Most constructivist scholars have typically focused on non-security areas such as human Most constructivist scholars have typically focused on non-security areas such as human rights and the environment. An exception in the field of security is the case of landmines, a landmark case where humanitarian norms were seen as an independent source of change. The examination of the role of the ICRC in the Montreux Document has clear parallels with the case of the ban on landmines.⁴⁸

I shall show in chapter one that the origins of the Swiss Initiative are initially found in norms, not only in states' interests. I then test if the norms that Montreux put forth have become constitutive after the first five years.

At the inter-state level, the influence of ideas on the practice of politics leads me to consider the state's monopoly on violence, as well as neutral humanitarianism, a notable driver of the Swiss initiative. The power of principled ideas, as Sikkink called it, in the form of democracy and human rights, can provide long-term prospects for PMSCs norms in Africa, especially in the context of a gradual democratization, especially as African states become increasingly politically pluralized and democratic.⁴⁹ The anti-mercenary norm is by far the strongest driver or inhibitor of regulatory cooperation both at the state level and at the global level. I turn now to the definitions and theoretical expectations of norms.

⁴⁸ cf. Price 1998. ICRC took the preeminent role of initiator and *norm entrepreneur*.

⁴⁹ Young, C. (2012: 222–224). Young contends that for most African countries this opening up has signified a move 'away from authoritarianism rather than to full democracy', the introduction of more regular elections and freer civil societies than has previously been the case on the continent

Norms (II): Defining mercenary and the anti-mercenary norm

The role and impact that ideas can have must be articulated through the definition of mercenary and anti-mercenary norm.

Mercenaries are difficult to define. The UN definition of mercenaries and the Geneva Conventions involve six points but mostly revolved around the foreign *status* and the *motive* of financial gain. Percy proposed a new definition in terms of degree of attachment to a cause and legitimate control.⁵⁰ What differentiates mercenaries from other fighters is that a mercenary has *low* attachment to a cause and *low* legitimate control – i.e. he acts relatively independently, selling his services or the services of a company he commands to other entities. Her definition avoids several important conceptual problems.⁵¹

Norms (III): Content and direction anti-mercenary norm

A strong and expansive anti-mercenary norm cast a cloud on an agreed upon distinction between PMSCs and mercenaries and delay or interrupt regulatory cooperation on PMSCs. Percy argued that the norm against mercenarism has become “more puritanical” due to the emergence of PMSCs.

The IR literature defines the norm as an antipathy (Taulbee 1985) or as a broad and global proscriptive social norm (Percy 2007). For Percy, it is a norm that has *restricted state use of mercenaries at the same time it has influenced, and often constrained, the opportunities available for mercenaries*

⁵⁰ She claims that these variable are better because 1) The concept of attachment to a cause cuts to the heart of what we find morally problematic about mercenaries. Mercenaries are morally problematic because they cannot provide a plausible justification for killing; they cannot point to a cause in the service of which they fight, aside from financial gain. 2) The variation in the entity exercising control; in modern times this has been the sovereign state, while previously it might have been a lord, king, city state, or even the papacy

⁵¹ For example mercenaries, *when placed under legitimate control, are regarded as less threatening (...) They no longer represent private interests, even though they may still find that they are accused of not having an association with a cause.* Percy, Op. Cit, p.58

themselves.⁵² The antipathy that Taulbee describes is distinct from the stigma attached to role of security guards in the suppression of labor disputes during the days of the Pinkertons.⁵³ Taulbee argued that concern started during the decolonization phase with the secessionist movement in Katanga hiring mercenaries to suppress a revolt in the 1960.⁵⁴

Norms can be subject to a degeneration that may lead to their gradual decline. The decline and disappearance of the norm on declaration of war is a case in point in the international system;⁵⁵ a common example is also the weakening in submarine warfare norms.⁵⁶ The scholarly wisdom is that the anti-mercenary norm was however, reformulated and its application limited. In the last decade, the negative perception of *combat* activities led security firms to a reorientation from combat-oriented to combat avoiding.⁵⁷ Both PMSCs and states acted as the entrepreneurs for policy change.⁵⁸ PMSCs providing defensive services only, do not violate the anti-mercenary norm and have become increasingly legitimate actors.

Norms (IV): Theoretical Expectation on the anti-mercenary norm

None of the above literature, however, has studied the role of the anti-mercenary norm in the context of African states. I build a theoretical expectation that the norm has been reformulated

⁵² It originates in two characteristics. One is the fact that mercenaries do not fight and kill for a collective political cause but for personal gain. The other is the lack of legitimate controls over mercenaries. Both features have survived in various manifestations over the centuries, ensuring the survival of the norm against mercenary use until today (Percy 2007)

⁵³ It should be noted that private force was a precursor of the police in the U.S.A as well as in Europe. Pinkerton created an agency in Chicago that provided investigation and security services, particularly on railways across the country. On Pinkerton's, see Frank Morn, *The Eye that Never Sleeps*. He is memorialized in two photographs on the second floor of the Smithsonian Museum of American Art in Washington D.C.

⁵⁴ It is the association with the self-determination norm that determined its strength for Percy. It was really "rooted in the symbolism of "racism and neocolonialism within the Afro-Asian bloc", for Taulbee and neither the "reversal of loyalty", nor their military effectiveness is an explanation of the antipathy towards mercenary involvement Taulbee, James L. "Myths, mercenaries and contemporary international law." *Cal. W. Int'l LJ* 15 (1985): 339.341-2).

⁵⁵ Fazal, Tanisha M. "Why States No Longer Declare War." *Security Studies* 21.4 (2012): 557-593.

⁵⁶ Legro, Jeffrey W. *Cooperation Under Fire: Anglo-German Restraint During World War II*. Cornell University Press, 1995. Ch. 2

⁵⁷ Percy 2007:227; Petersohn 2014; Leander

⁵⁸ Petersohn 2014 and Leander emphasize PMSC and their role of change agent or even of epistemic community; Fitzimmons claims norm change was championed by states

but is still influential. I probe for the drivers of the norm at the state-level and at the inter-state level. I have theoretical expectations on both fronts.

First, negative reactions to the rise of PMSCs within many institutional ambits, including the UN, demonstrate that the norm is still alive. The existence found confirmation in Percy's interviews of peacekeeping directors.⁵⁹ Percy claims that "Without (the norm), (...) we cannot understand how today's private military industry developed and the obstacles it faces".

Secondly, at the state-level, I expect the norm to be especially strong and ambiguous in contexts where mercenarism resonated. When the norm becomes puritanical, it "prevents clear thinking (...) leading to condemnation of the use of private force whether that force is directed towards stopping a war or towards promoting it" and this leads to a moral position that "is, in some cases, perverse".⁶⁰ Given this anticipation, I inquire if the rhetoric of mercenarism can be a proxy for something else and part of a strategic move to influence the public. Thus I consider several questions such as for example: Who adopts the idea and who are the advocates? What social and political character do they possess; how do ideas come to prevail- i.e. what linkages they have to the political power so that they rather than a rival set of ideas, prevail?

⁵⁹ Percy 2007:224

⁶⁰ Percy 2007:220. Condemning the use of private force, even in situations where states have no other choice, seems to be deeply unfair. If 'other nations, individually or collectively, are not going to contribute to multilateral peacekeeping or peacemaking forces, shouldn't a state have a right to hire a force able to keep order? It seems distinctly odd, both legally and morally, to argue that a state is somehow required to depend on whatever conscripts it can muster and train them as best it can, rather than obtain expert assistance from outside'. (...) It is even more odd to condemn a state for receiving expert *private* assistance to solve its dire security problems when expert *public* assistance receives plaudits from the world community. American and French interventions to end hostilities in **Liberia** and Côte d'Ivoire, for example, were praised for working to end severe crises."

Interests

Continuity or change in PMSC governance depends crucially upon states' interests. I should be quite clear: ideas do not shape capabilities or threats. However, they do influence the way we think about interests. Thus, my definition relies primarily on Katzenstein's assertion that interests are *not obviously discovered by self-interested, rational actors but rather they are constructed through a process of social interaction*.⁶¹ Instead of relying on 'Thucydides' strong definition for interests as the 'surest of bonds between states' or Morgenthau's conceptualization⁶², my inquiry is led by the search for construction of interests- be it national interests or economic interests.

Such notion of interest helps rationalize the beliefs of policy makers and how these ultimately shape state preferences. Ideas interpenetrate state interests. Threats in the United States led to a retreat of the ideals enshrined by the constitution, as Benabib wrote⁶³. The interplay between interests and international factors contributes to the development of states' choices towards Montreux and I contrast the role of the U.S. and China in shaping interests and ideas. If state capitalism embrace corporate private security overseas; is it regulatory politics part of contingent or strategic approach? I trace China's development of security choices, the use of contractors after the attack on the capital of Sudan of 2008 and the engagement with regulatory cooperation by studying the participation of Chinese foreign policy both to Montreux and U.N. initiatives.

⁶¹ Katzenstein, Peter J., ed. *The culture of national security: Norms and identity in world politics*. Columbia University Press, 1996. p.

⁶² Morgenthau definition is helpful in defining the concept of interest in terms of power. "It imposes discipline upon the observer, infuses rational order into the subject matter of politics and guards against two popular fallacies: the concern with motives and the concern with ideological preferences". Cf. Morgenthau H. J. (1972) *Politics among nations: the struggle for power and peace*

⁶³ Politics in Dark Times, p.3. She writes that *the U.S. Constitution hemorrhaged in the hands of those who claimed the executive power, beyond the rule of domestic and international law, would determine the status of enemy combatants. Evidence was mounting that torture, including waterboarding, was used by the American military as well as paramilitary contractors working for Blackwater Security in Iraq*

Some accounts conflate the privatization of security and the interest of a single state or of corporate actors. There is no lack of merit in this claim. For example, the literature stressed the role of the insurance company as a form of private authority and policy-making in global governance.⁶⁴ These players were agents of change in PMSCs governance and influenced the construction of interests in the field of maritime security. However, my research assumes that state interests are hierarchical superior in the process of interest construction, be it small and medium states' as much as strong states' interests.⁶⁵ Be in Switzerland or South Africa- views born from the national interests asserted the need for reform paths. It was national interest of small states like Switzerland that informed and shaped engagement with international regulation as well as the creation of the Montreux Document itself. It was the perception of encroached sovereignty that shaped the South African contestation of Montreux.

Institutions

Third and last, my methodological choice is to search for the influence of institutions and institutional change because a degree of autonomy in institutions can explain how the past influences the present and the future, and the way that incremental institutional change affects the nature of path dependence (North 1990). With this third variable, I avoid the excessive emphasis on the role of ideas, or on the impact of interest.⁶⁶

⁶⁴ Carmola 2010 Haufler 1997; Ericson and Doyle 2003, 2004.

⁶⁵ Chapters one and six

⁶⁶ I refer to Van de Walle, *African Economies*, Ch. 2, and to Lewis, *Growing Apart*, Ch. 2. Some approaches put too much emphasis on the impact of interest groups on the state especially for the inability to overcome opposition to the policy reform. Other approaches underestimated the capacity of the state considerably by taking government commitments for granted, conflating state autonomy with state capacity (Van de Walle, *Ibid*, pp. 44-5)

An institutionalist approach is not novel in analyzing the *Market for Force*; Deborah Avant has juxtaposed economic and sociological institutionalist logics and stressed that institutions provide a nonmarket channel to overcome market failures.⁶⁷ Since Avant's seminal contribution, Montreux has further forced states and non-states to regularize expectations and constrain behavior. Arguably, some degree of change has taken place since Montreux - i.e. the recognition that non-state legitimate actors with an internationally assigned name can use of force in the context of *self-defense*- hierarchically subordinated, however, to the state responsibilities- i.e. obligations to prevent, remedy, investigate and prosecute. A new community of practice has defined the players and the rules particularly associated with the rise of a monitoring mechanism of states into voluntary regulations.⁶⁸

A dimension of institutional change is that it often arises from political conflict in which actors and interests contend for preferred institutional arrangements. Indeed, conflict characterized the development of a field where both market actors- from PMSCs themselves, to insurance and the shipping industries⁶⁹- and non-market actors and international organizations, like the International Committee of the Red Cross (ICRC) and the International Maritime Organization (IMO) were capable of shaping some outcomes and craft the new 'rules of the game'.⁷⁰ Conflict is indeed common in the accounts of the creation of new organizational fields- like transnational arbitration.⁷¹ My study suggests that states and nonmarket actors were indispensable in defining new rules of the game amidst conflicts and divergence in interpretation. While none wanted to be driver of intergovernmental discussion around topics

⁶⁷ She generated a useful framework to analyze the three levels of *control* over PMSCs 3 areas where it matter the most: when the states contract for private delivery; when states regulate security services exports, and when non-state actors finance security services

⁶⁸ Cf. Chap. 4

⁶⁹ On the influence of the insurance and shipping industry on regularizing PMSCs on board ships, see chapter 7

⁷⁰ Cf. Chapter 1 for ICRC and Chapter 5 for IMO

⁷¹ Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1998. Their history stresses the delicate transition from personal charismatic to routinized and specialized expertise negotiated by the International Chamber of Commerce

with contentious histories, like mercenarism and piracy, both the ICRC and the IMO, stroke a balance between the organizations' mandates with the interests of key societal actors and the political incentives faced by governments; they accompanied the rise of a form of voluntary regulation that contributed to regularize expectations, risks and costs. This is what I examine in Chapter four, "Designing Institutions: the Role of the State in Voluntary Regulation". I suggest that a weakness of commitment lurks over regime construction and the autonomy of institutions as explanatory variable.

In part III, I choose to nuance the influence of institutions because of the increase evidence of the role of informal institutions. In the African context, informal institutions are not just constraints that can be done away with, as the neo-institutionalist approach puts it, but the very fabric on which social fabric is based.⁷²

At the inter-state level, the continent's main political institution, the African Union, has never taken up the question of private security regulation even if several arrangements have been devised for peace and security.⁷³ The A.U. convened a meeting of experts to review the organization's legal instruments, including the 1977 Anti-Mercenary Convention. As noted by Gumedze, the latter could have *presented an opportunity for the AU to simultaneously address the challenges posed by PMSCs in the region*⁷⁴. However, the time was not ripe: the A.U. was more interested in enforcing broader norms that help maintain political order, like the prevention

⁷² Chabal, Patrick, and Jean-Pascal Daloz. "Africa works: the political instrumentalization of disorder. Indiana University Press, 1999. For an account of the economy of affection, cf. Hydén, Göran. *African politics in comparative perspective*. Cambridge: Cambridge University Press, 2006.

⁷³ E.g. the Peace and Security Council, to the Panel of Wise, the Continental Early Warning System (EWS) and the African Standby Force. In a study of security arrangements, Engel and Porto refer to the AU architecture as a de facto regional regime, although limited by a lack of follow-through. Engel, Ulf, and João Gomes Porto, eds. *Africa's new peace and security architecture: promoting norms, institutionalizing solutions*. Ashgate Publishing, Ltd., 2010. Engel, Ulf, and João Gomes Porto. "The African Union's new peace and security architecture: toward an evolving security regime?" *African Security* 2.2-3 (2009): 82-96.

⁷⁴ Gumedze, Sabelo. "Merchants of African conflict: more than just a pound of flesh." *Institute for Security Studies Monographs* 176 (2011)

of military coups⁷⁵ and the control conventional ‘mercenaries’ of the type high-lighted by the 2004 coup attempt in Equatorial Guinea.

Case study method

In what follows, I use a variety of devices including process tracing, the case study and the paired-case methods. First, I use process tracing to identify the intervening causal process- the causal chain and mechanism- between independent variables and the outcome of the dependent variable. In their *Case Studies and Theory Development*, George and Bennett write that tracing the process that may have led to an outcome, helps narrow the list of potential causes.

In part II of the dissertation, I use the case study methodology at the *global* level. Then, in part III, I use case studies at the state level.

In chapter three, I seek order by attempting a *disciplined interpretive* case study.⁷⁶ I select a venue and time- the conference *Montreux +5*- as the litmus test for assessing implementation efforts of States in implementing PMSCs norms and for understanding how key events selected or blocked some possible future paths. I try applying a known theory- regime theory- to the terrain of PMSCs governance⁷⁷. Thus, I use a variety of process-tracing- i.e. analytic

⁷⁵ Souaré, Issaka K. "The African Union as a norm entrepreneur on military coups d'état in Africa (1952–2012): an empirical assessment." *The Journal of Modern African Studies* 52.01 (2014): 69-94. The evolution of policy on coups included condemnation, sanctions, and the concept of Unconstitutional Changes of Government (UCG), with a list of situation considered illegitimate, including 'intervention by mercenaries to replace a democratically elected government'

⁷⁶ Odell, John S. "Case study methods in international political economy." *International Studies Perspectives* 2.2 (2001): 161-176.

⁷⁷ Ibid. The more explicit and systematic the use of theoretical concepts, the more powerful the application. Although this method may not test a theory, the case study shows that one or more known theories can be extended to account for a new event.

explanation- and convert the historical narrative into a reasoned explanation couched in the theoretical tradition of regime theory.⁷⁸

My methodological choice is to proceed first at the global level and then proceed to the continental level, combining micro- and macro analyses and narratives. The first section of the dissertation focuses on worldwide governance (Part I). The first section of the dissertation focuses on global description of the emergence of what I call the 'private security regime complex'.

The second investigates the limits and potential of the working parts (Part II). Haas wrote that the literature had focused on *correlates of regimes- such as political order and economic growth- instead of studying the transformative process that regimes may initiate or foster*.⁷⁹ The first two parts of the research investigate whether such a transformative process has developed.

Following other scholarship on regime complexity, because state preferences do not reflect state behavior, understanding preferences is fundamental. Then, I move to the state level of analysis in the context of Africa (Part III). I focus on the puzzle of preferences in African states, an outstanding representation of the divergence.

Case selection

My selection of case studies consists of four main cases: Nigeria, South Africa, Sierra Leone and Liberia. All cases are in Africa because the continent offers an array of variation in study

⁷⁸ Varieties of Process-Tracing, George and Bennett, *Op. Cit.*, pp.210-212

⁷⁹ Haas, Peter M. "Do regimes matter? Epistemic communities and Mediterranean pollution control." *International organization* 43.03 (1989), p. 377

of the conflictual evolution of PMSC governance. Even if PMSCs are visibly deployed in contexts such as Iraq, Afghanistan or Pakistan, or sometimes in Latin America, few states had comparable levels of agency that comprise contestation or extraversion. The ‘marginalized’ continent offers more inspiration on state choices on PMSCs governance than Asia or Latin America.

Second, the focus on Africa fits with the priorities outlined in the literature on private security in international politics where the *markets re-distributes power over the control of force* particularly in transitional or immature states.⁸⁰ Avant mentions three altered expectations for IR theories. For mature democracies, the market for security often *enhances a state’s capacity but also erodes transparency and constitutionalism*. Second, it offers short-lived increases in capacity to transitional or immature states. Third, *private security reinforces the dilemmas pointed to by the literature on the resource curse and rentier states, deepening the expected difficulty of state building*. If the primary criterion for case selection should be relevance to the research objective⁸¹ of the study⁸², then Africa is the most germane context.

Two country cases could not be ignored in the mosaic of regulatory cooperation- the hegemonic African states, Nigeria and South Africa. The South African case is unique both because of the history of private security and because of the repeated attempted expropriation of foreign-owned security companies. South Africa has a highly regulated industry and almost two millions registered security officers⁸³. It was also South Africa that gave impetus to the

⁸⁰ Williamson 1975; Thomson 1994; Williamson 1999 cited in Avant 2006: 508

⁸¹ Avant’s third point is that privatized security challenges the oft-assumed collective monopoly of states over violence. Avant 2005 p. 228; Avant 2006: 508

⁸² George and Bennett, Op. Cit., 83

⁸³ Data include active and non-active registered security officers registered with PSiRA (report 2012-13); cf. Chap. 5 and 10

project of the United Nations Draft Convention on private security. At the heart of the preoccupations was ‘foreign enlistment’ or the hiring of so-called Third Country Nationals (TCN)- i.e. the reliance of PMSCs on foreign employees for a variety of tasks in the security area- including guarding military bases, facility maintenance, guarding checkpoints or sensitive infrastructure. TCNs posed several problems: they may not be accountable to any American government authority⁸⁴, they were reportedly associated to illicit activities⁸⁵; and they were especially susceptible to forced labor and human trafficking⁸⁶. In reference to Montreux, Perret also writes:

*The States of origin (of Third Country Nationals) may not fall under the current categories of Contracting, Territorial, or Home States. For example, in Chile’s situation, some of its citizens were contracted by U.S. companies through non-U.S. based hiring firms under contracts that referenced neither Chilean nor U.S. law. The Montreux Document’s State categories do not directly address this situation.*⁸⁷

The second case is Nigeria. She is Africa’s hegemon and can develop a vast influence over the practices of the market for security. The role and influence of Nigeria is key in understanding institutional agency in supporting or thwarting new initiatives, and thus affecting preferences, both domestically, and through the regional and continental organizations that can resist or alter the embedded prevailing institutional logics. Relatedly, Western Africa is one of the most important contexts for other reasons. First, it has been the most volatile area of Africa and the

⁸⁴ U.S. Commission on Wartime Contracting, Interim Report 2009, cited in Mandel, Overview of American Government Expeditionary Operations Utilizing Private Contractors, in Kinsey and Patterson, Op. Cit., p.18

⁸⁵ Mandel, Op. Cit., p.18.

⁸⁶ Ibid., DCAF Report; Perret, Op. Cit.

⁸⁷ Perret in DeWinter-Schmitt, p. 38. It should however be mentioned that the Montreux Document refers not only to the home, contracting and territorial states but also to all other states including therefore the third country nationals.

nexus between PMSC and instability is unequivocal.⁸⁸ Secondly, a focus on West Africa casts a net over state difficult and incomplete choices on private maritime security. Yet, the Gulf of Guinea, one of the most dangerous in the world, is where PMSCs are increasingly used.

“With more cases, the investigator can begin to chart the repertoire of causal paths that lead to a given outcome and the conditions under which they occur”.⁸⁹ Thus, I search for other cases that have been considered relevant by the literature and by recent policy debates, and cases that adequately represent policy decisions for and against regulation, Sierra Leone and Liberia are ideal cases: the former is a signatory of Montreux, the latter is not. The two cases are similar systems that only differ in the *dependent variable*, i.e. participation to international cooperation. The likeness of Sierra Leone and Liberia allows us to control for important explanatory factors and accentuate the comparative value of the analysis when tracing policy formation. International factors and contingency explain resistance to regulatory cooperation. Thus, my selection consists of four main cases: Nigeria, South Africa, Sierra Leone and Liberia. I also use two minor case studies for comparative insights: Uganda and Madagascar, which are not fully-fledged but help investigate selected questions- i.e. the accommodation to the Montreux Document for the former; and in the case of Madagascar, the tension between the varying influence of the anti-mercenary norm and human rights norms.

Data and interviews

Interviews and participation to conferences constituted a key source for this work as well as

⁸⁸ Cf. Branovic’s statistical survey on the use of private military and security companies in failing states in the period 1990–2007. Cf. Chapter Six

⁸⁹ George and Bennett, *Op. Cit.*, p.207

the analysis of primary and secondary literature, archival material, and news sources. Further, I could test my ideas with fieldwork in South Africa in January-February 2014 and in Sierra Leone in September of 2015. I relied on sources and scholarship available in English, and in other European languages.

I draw from a variety of data collected during research work conducted in 2013 and 2014, including over 70 interviews with politicians, including a president, ambassadors, PMSCs directors and security officials, lawyers, delegates of international organizations and other informants. I relied on many interviews carried out in Washington, London, Geneva, and Africa. Other interviews took place at conferences on PMSCs, such as the workshop on maritime security at DCAF (Geneva, Switzerland, July 2014), and at the United Nations, at the second IGWG (New York, July 2013); and at the third IGWG (Geneva, Switzerland, in July 2014).

My research benefited from my participation as a contributor to the *Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices*⁹⁰ - or the Shadow Report- an attempt of academics and activists to write a report, alternative to the official one, with challenges and recommendations for addressing gaps in the effectiveness of the Document⁹¹. The one-day conference at American University Washington College of Law provided an initial arena to assess the divergence of opinions regarding the achievements of the Montreux Document.

⁹⁰ Rebecca DeWinter-Schmitt (Ed) *Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices*, available at <http://ihrib.org/wpcontent/uploads/2013/12/MontreuxFv3.pdf>

⁹¹ The presentation of the results at the conference at American University Washington School of Law provided an initial arena to assess the opinions regarding the achievements of the Montreux Document.

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PREAMBLE

Elements of political economy

The variation in the level of contracting depends upon the varying effect of a series of global factors. The literature on the privatization of security proposes six main explanations for the increase in contracting. The first three are by far most prominent: increased demand due to Western unwillingness to intervene, the spread of neoliberalism, changes in the availability of military supplies and personnel. The others include post Cold-War military downsizing, changes in Warfare, and technological change⁹². Thus, scholarly inquiries into private security have increasingly rejected single cause explanations in favor of a more comprehensive gradient of factors.

In what follows, I give particular emphasis to some of these aspects, particularly the end of the Cold War and the reluctance to intervene, and contextualizing these factors in the African continent, I propose a matrix that comprises several key junctures (see Table B below).

The end of the Cold War spurred an excess supply of veterans and weapons that became available for new opportunities (**Factor A**). These are generally seen as the first contemporary

⁹² Based on Hilde van Meegdenburg (2015) What the Research on PMSCs Discovered and Neglected: An Appraisal of the Literature, *Contemporary Security Policy*, 36:2, 321-345.

instance of private security but some argue that a market for force has always existed whenever supply aligned with demand, and veterans needed jobs.⁹³ Yet, the global political economy that ensued was more than a misalignment of demand and supply. Besides, the end of Apartheid and the restructuring of the South African security (**Factor A1**)⁹⁴ added a continental dimension that drove supply further. The introduction of private security as an alternative to military aid was not perceived as a problem for governments.⁹⁵

⁹³ Avant 2005:80. Also cf. Carmola 2010. She reviews scholars of military downsizing and finds there is a long-established patterns of demobilized forces migrating to other areas of the world with their expertise for sale. From the Peloponnesian War to the demobilized Russian and British hired by Chiang Kai-Shek (Fenby 2004); the Germans in China in 1920s (Krebs in Lock 1998); to the US veterans of WWI finding employment as strike breakers in mining camps; to the wars of independence in colonial Africa and South Asia fought by WWII veterans.

⁹⁴ A push factor in Abrahmsen and Williams, Op. Cit, p.25

⁹⁵ Kinsey, Ch. 3, The Role of PMCs after the Cold War

TABLE B⁹⁶	Global Changes in Demand or Supply	Political Economy in Africa
Cold War	A Change in availability of labor and arms spurs supply of PMSCs ⁹⁷	A1 End of Apartheid increases availability of labor for PMSCs
Somalia	B The Black Hawk Down accident disrupts support to aid practices ⁹⁸ ; the U.N. contemplates use of PMSCs for peacekeeping missions. ⁹⁹	B1 Faced with unrest and less international support, governments in developing countries use PMSCs for political control (Executive Outcomes in Sierra Leone)
Balkans and Warlord politics	C Strong states use contracting to circumvent constraints (Ex. MPRI mission in Croatia circumvented a UN embargo) Neoliberalism: justifications for contracting are reinforced by initiatives formulated during the Reagan-Thatcher era that encouraged government privatization and outsourcing	C1 Unwillingness to intervene intensifies. Western nations hire PMSCs to train African states' military and security forces; Warlord and private security in Sierra Leone: "Arms to Africa affair"

⁹⁶ Table B is my elaboration based on Baum and McGaha 2013; Avant 2005, Gumedze 2007 and 2012, Ostensen 2011, Carmola 2010

⁹⁷ Singer 2003, Avant 2005; Howe, Herbert M. *Ambiguous order: military forces in African states*. Lynne Rienner Publishers, 2001.

⁹⁸ Avant, 2005. PDD25, for example, resulted in US opposition to the UN peacekeeping operation proposed to end the 1994 genocide in Rwanda

⁹⁹ Cf. Chap. Two. For example, to respond to a Security Council mandated peacekeeping mission in Somalia, the UN approached Defense Systems Limited (DSL) to deploy 7000 Gurkha guards to protect relief convoys in Somalia

9/11 and Non-state Violence	D U.S. contracts to PMSCs rise domestically and internationally to guard high-value assets	D1 Counter-terrorism policies increase use of PMSCs in Africa; use of PMSCs in anti-terror operations from Kenya to Nigeria ¹⁰⁰
Iraq War	E The Iraq War, not Afghanistan spurs, the need for PMSCs of foreign enlistment. Role of incidents: Fallujah presented for the US military a second ‘Mogadishu moment’ ¹⁰¹ ; Nisoor Square led to the endorsement of the Montreux Document	E1 Third Country Nationals: Demand for cheap labor for security related tasks, aided by “security entrepreneurs” in Africa and government laissez faire
Piracy	F Demand for maritime policing to counter piracy in Horn of Africa	F1 Increased use of PMSCs in maritime-related tasks

¹⁰⁰ cf. Chap. 6

¹⁰¹ Scahill, Op.Cit., p.168

Then, an essential factor became the Western unwillingness to intervene, which is indicated as an explanation by a relative majority of scholars.¹⁰²

The West becomes more reluctant to intervene after the Black Hawk Down accident dramatically influenced Western public (**Factor B**, in the table). For states, PMSCs are a less visible alternative commitment. In regional context, states use PMSCs for political control. For Herbst, the increased demand for private security services in Africa, was due to Western countries conscious and strategic decision to disengage from African politics¹⁰³ (**Factor B1**). States are also able to circumvent constraints but the relation to PMSCs is not without externalities. The MPRI mission in Croatia circumvented a UN embargo¹⁰⁴, Sandline evaded an arms embargo in Sierra Leone thus associating private security to the problems of proxy forces and plausible deniability. In Sierra Leone, Executive Outcomes (EO) first, and Sandline next, were associated to the 'Arms to Africa' affairs which spurred a realization of the extent of PMSCs work, and led to the United Kingdom's Green Paper of 2002. This was a turning point in the perception of the legal nature of PMSCs. As Kinsey writes, it would have been a simple matter of procedure to outlaw PMSCs but "there occurred a shift in the perceived legality of the activities" of PMSCs¹⁰⁵.

Organizations, like states, UN agencies and NGOs increasingly contemplate the use of PMSCs¹⁰⁶. Demand for training and peace operations increases in the wake of growing

¹⁰² According to a survey of 151 works, 30 percent indicate Western unwillingness to intervene, as opposed to spread of neoliberalism (22%), availability of military supply and personnel (18%), post-Cold War military downsizing (11%), changes in warfare (9%), technological change (6%). Cf. van Meegdenburg, Op. Cit.,

¹⁰³ Jeffrey Herbst, 'The Regulation of Private Security Forces' in Greg Mills and John Stremlau (eds), *The Privatisation of Security in Africa* (1999) 125.

¹⁰⁴ PMSCs also enabled governments to circumvent constraints on military action, either self-imposed (e.g., Congressional limits on US troop deployments) or by international agreement (e.g., UN embargos). Cf. Baum and McGaha 2013

¹⁰⁵ cf. Kinsey 2006: 90-93; On Sierra Leone, cf. Chap.8

¹⁰⁶ Østensen identified three factors in the U.N. demand for PMSCs. The formulation of new principles like the 'responsibility to protect' proposing extended responsibilities leading to evolving peace operations; a shift away from Western states as prominent troop providers, towards developing nations largely taking over this task. Third, more complex conflict environments and multiple emergencies (Østensen 2011:19-40).

conflicts in interventions¹⁰⁷ (**Factor B2**). In the face of conflicts, the ineptitude of African militaries, as Howe calls it, suggests an outstanding ambiguity between the need to address the threat to the existence of African states and the political responsibility to improve their military forces.¹⁰⁸

In the Balkans the need to intervene was not clear to the U.S. public¹⁰⁹ (**Factor C**). A continued disinclination towards foreign interventions coincides with political and economic ideologies that favor a diminished level of state intervention, and an all-volunteer military force¹¹⁰.

The use of PMSCs enables governments to circumvent constraints on military action, either self-imposed (e.g. Congressional limits on US troop deployments) or by international agreement (e.g. UN embargos). The US government gives greater support to PMSCs involvement in foreign policy. Not so the UK government¹¹¹ - but controversies surrounding the British firm Sandline lead to a turning point in British politics as well, both in the oversight towards PMSCs but also towards their acceptance as legitimate actors.¹¹²

The Arms to Africa affairs also reveals the extent of what Will Reno termed *Warlord Politics* (**Factor C1**). Foreign privatizing of security gives rulers of weak states capabilities and access to resources they would otherwise find difficult to obtain. The reluctance to intervene and the neo-liberal norm puts weak states in front of a dilemma: for Reno, “closer integration of [African] states into global markets promotes warlord politics”.¹¹³

¹⁰⁷ Avant 2005:19-21

¹⁰⁸ Howe, Op. Cit.

¹⁰⁹ Singer 2003:58

¹¹⁰ Cohen, Eliot A. *Citizens and soldiers: The dilemmas of military service*. Cornell University Press, 1985, chap. 7-8. For a thoughtful and more recent examination of the competing ideological theories of republicanism and liberalism- which also includes neoliberalism- and how it continues to shape our understanding of the ideal role of the state, society and the military, cf. Krahmann (2010)

¹¹¹ Avant 113 on MPRI in Croatia; Kinsey 2006: 61

¹¹² Cf. fn. 107, Kinsey 2006: 72. Plans for regulation contained in the Green Paper subsequently failed but some progress was made (Krahmann 2010:116-117)

¹¹³ Reno William, *Warlord Politics and African States*. Cambridge: Cambridge University Press, p. 257

A **fourth factor** is the rise in non-state violence, which includes first and foremost the September 11th attack but continues to this day, with an acceleration in lethality in the Middle East and Africa. The September 11th Twin Towers attack changed world affairs dramatically and ignited a draconian response from the United States government that included the Afghanistan and Iraq Wars. Both the global use and the visibility of PMSCs rose (**Factor D**). An array of firms like Blackwater, ArmorGroup or Control Risks expanded their work. The scale of the atrocity committed on 9/11 was unprecedented: the U.S. had not suffered domestic casualties of such a scale since the Civil War¹¹⁴. The attack was aptly described as an unprecedented horror¹¹⁵; it marked the beginning of a new phase for international relations¹¹⁶; a return to state prerogatives in establishing the norms that govern international behavior¹¹⁷ and of *politics in dark times*.¹¹⁸ Based on such sense of vulnerabilities, the U.S. devised determined that the Geneva Conventions did not bind the conduct of the war, or ‘War on Terror’, as it became known, a point to which I return in chapter one.

The increased use of PMSCs was however, contingent, not planned. The choice to use contractors is often related to lack of planning. It is more *contingent* than strategic, as illustrated in the case of Nigeria, in chapter six. As Avant argued in relation to U.S. policy:

There was no campaign to privatize part of the military. To the contrary, as the decade unfolded, a variety of concerns were raised as use of private forces was implicated in poor performance, abuse,

¹¹⁴ With the exception, of course, of Pearl Harbor. Cf. Richardson, Louise. *What terrorists want: Understanding the enemy, containing the threat*. Random House Trade Paperbacks, 2007. Ch.6, “What Changed and What did not on September 11 2001”

¹¹⁵ “foraging around for a term to elucidate the incomprehensible, the media and intellectual elites entrusted with making sense of it all have resurrected the construct of totalitarianism and of the Nazi era. (Barber in Benhabib 269). “as the Holocaust defied explanation, today terrorism defies imagination and leaves America uncomprehending, vulnerable to fear-mongering and extremist polemics”. Barber is unconvinced, however, about the comparison of Islamic Jihadism and totalitarianism and writes that in spite of the affinity the 9/11 and the Holocaust are incommensurable.

¹¹⁶ Rosenau 2005- *Globalization, security, and the nation state : paradigms in transition*. Edited by Ersel Aydinli & James N. Rosenau

¹¹⁷ Evangelista, Matthew. *Law, ethics, and the war on terror*. London: Polity Press, 2008

¹¹⁸ Benhabib, Seyla, ed. *Politics in dark times: Encounters with Hannah Arendt*. Cambridge University Press, 2010

*and cost overruns...a direct causal linkage to expansion of their use after 9/11 cannot be established.*¹¹⁹

PMSCs became part and parcel of the security relationships even with parts of the world that the U.S. had considered only of marginal strategic security interest such as Africa¹²⁰. Africa had a strategic significance in the pre-9/11 period. Al-Qaeda first attack against the United States occurred in Somalia against the US-led humanitarian mission in the 1990s.¹²¹ Yet, post 9/11 counter-terrorism policies led to new security arrangements being forged (**Factor D1**)¹²².

The war effort in Iraq had a greater influence on the sector, (**Factor E**). It led to extensive overseas recruitment for PMSCs; enlistment developed, was opposed and other times aided by government laissez faire (**Factor E1**)¹²³. Historically, few international problems were caused by foreign enlistment but contestation of this process occurred in Africa where it ran counter domestic laws in several countries.¹²⁴ The phenomenon of TCN was almost entirely driven by the Iraq and Afghanistan wars. No more than twenty-four percent of U.S. contractor employees in Iraq and Afghanistan were actually U.S. citizens.¹²⁵

¹¹⁹ Burk, James, ed. *How 9/11 changed our ways of war*. Stanford University Press, 2013.

¹²⁰ Oyeade 2014; Branch 2011; cf. Part III

¹²¹ P. Pham in H. Solomon. p.7 Then, more known perhaps, are bombings of the US embassies in Nairobi and Dar el Salaam in 1998.

¹²² Notably, the U.S. has developed various counterterrorism initiatives involving the African Union (AU) and groups of selected states: the Trans-Sahara Counterterrorism Partnership (TSCP), the successor to the Pan-Sahel Initiative, and the Gulf of Guinea Guard Initiative. Also, in 2008, the overall U.S. military activities in the continent coalesced into a full military command known as AFRICOM

¹²³ See Chapter 6

¹²⁴ Cf. Chapter 6. Several countries banned recruitment altogether. Percy writes that, the overseas recruitment of British and US PMSCs was not considered problematic for Western policymakers. Neutrality laws have never banned foreign enlistment. As Percy explains, the 'real purpose of the neutrality laws was to prohibit the commission of unauthorized acts of war by individuals *within* their countries. (Percy, Op. Cit.)

¹²⁵ Schooner, Steven L., and Collin D. Swan. "Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity." *Journal of National Security Law & Policy* (2012). U.S. Commission on Wartime Contracting, in its February 2011 Interim Report to Congress cited in p.37 http://jnslp.com/wp-content/uploads/2013/05/Dead_Contractors_Schooner_Swann.pdf

Last but not least, and quite independently of non-state violence and counter-terrorism policies, Somali piracy spurred a unique demand for PMSCs (**Factor F**). Coupled with naval patrols, the use of security teams on board ship to counter pirates became an established practice securitize the Horn of Africa.¹²⁶ More liberal preferences developed. In Spain, where the government authorized and subsidized the fishing industry's use of PMSCs; in Iran, the world's fourth largest tanker operator, Iranian NITC, deployed armed security on board ships.¹²⁷; a Chinese shipping firm allocated hired a British PMSC for a fleet of 80 ships.¹²⁸

The strategy was highly successful in protecting trade in an economy that relies heavily on transportation of goods by means of international waters. Pirates expelled, commerce restored.¹²⁹ Not a single pirate attack was successful on ships with armed guards on board.¹³⁰ The United Nations specialized body, the I.M.O., eventually issued guidance to organize the practice.¹³¹ While this activity represent a smaller share than the market on land¹³², one firm forecasts the global maritime security market to grow from \$13.94 billion in 2014 to \$20.87 billion in 2019¹³³. However, this increase in contracting creates present challenges for domestic regulation with the example of the *floating armories*- part storage depot, part housing for PMSCs- which by being positioned in high-risk areas of international waters could be targets for attack or circumvent national laws limiting the import and export of weapons¹³⁴ (**Factor F1**).

¹²⁶ Note that earlier, pirate attacks in the Malacca Strait between 1999 and 2005 led to the first antipiracy services in this waterway but the practice did not become established until later. See Chapter 7

¹²⁷ Cullen, Patrick, and Claude Berube, eds. *Maritime private security: market responses to piracy, terrorism and waterborne security risks in the 21st century*. Routledge, 2012: 32

¹²⁸ Berube and Cullen, p.6

¹²⁹ It was the imperial motto chosen for the Bahamas in 1718 and it originates from the elimination of piracy by Governor Rogers. However, Storr argues when Rogers expelled the seafaring pirates from the Bahamas, commerce was not restored, other forms of piracy thrived. Storr, Virgil Henry. *Enterprising slaves & master pirates: Understanding economic life in the bahamas*. Peter Lang, 2004.

¹³⁰ Private security on board ships was part of a large set of measures to prevent attacks; cf. Chap. Seven

¹³¹ Author's Interviews, June, 2015; Cf. Chapter Seven

¹³² Cullen and Berube, Op. Cit.

¹³³ <http://www.marketsandmarkets.com/Market-Reports/maritime-security-market-1033.html> Accessed April 8, 2015. At a Compound Annual Growth Rate (CAGR) of 8.4% from 2014 to 2019

¹³⁴ cf. below, p.112

PART I: Ideas, Interests and Institutions

Chapter 1: The Swiss Initiative¹³⁵

1.1 Content and significance

The Swiss initiative produced the Montreux Document, a non-binding legal tool divided into two main parts¹³⁶. Both parts examine the hard and soft law relevant to the three categories of states implicated by PMSCs' activities: *contracting* states, *territorial* states, and *home* states. Contracting states are states that directly contract for the services of PMSCs; territorial states are states on whose territory PMSCs operate; home states are states of nationality of a PMSC, i.e. where a PMSC is registered or incorporated.¹³⁷

The Document stresses that the 73 “good practices” contained in the Document “may lay the foundations for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards¹³⁸. The preface of the Document makes it clear that the PMSCs norms are not limited to armed conflict settings and

¹³⁵ An earlier version of this chapter was presented at the APSA-ISA Security Conference, Austin (TX), July 2014

¹³⁶ The first one “recall(s) existing legal obligations of states and PMSCs and their personnel”, and the second one “provide(s) states with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (part two).” Montreux Document, preface, para 2.

¹³⁷ Montreux Document, preface, para. 9.

¹³⁸ White, N. D. (2011). “The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention”, *Human Rights Law Review*, 11, pp. 133-151.

not exclusively applicable to states.¹³⁹ This is significant because PMSCs continue to be used in both international and non-international armed conflicts, but also in a wide variety of contexts, many of which are not armed conflicts.

Cockayne writes that “given the uncertainty around the US position on such issues . . . , this was no small achievement. Indeed, one US government participant (called it) ‘a significant achievement of historic importance’”¹⁴⁰. By reaffirming that International Humanitarian Law and International Human Rights Law apply during armed conflict and that states have an obligation to ensure respect for them, the Montreux Document “clearly addressed the prevailing concern at the time that PMSCs operated in a potential legal vacuum.”¹⁴¹

The Document encourages cooperation between states in implementation, suggesting that the realization of the Document’s aims will be an ongoing process.¹⁴² Naturally, part of that cooperation includes working with PMSCs.¹⁴³

1.2 Origins

In the Swiss initiative, the idea of neutral humanitarianism, advanced by ICRC through its reflections and quiet advocacy, had two ideational components. Taken together these ideas, which have historically served as “focal points” across a number of policy arenas, provide an explanation of the early preference formation in this issue-area. The first idea is

¹³⁹ The Montreux Document, U.N. doc. A/63/467-S/2008/636, at Preface ¶¶ 5 & 8 (2008) *available at* <http://www.cda.admin.ch/psc>

¹⁴⁰ Cockayne, *Op.Cit.*, p. 401

¹⁴¹ The concern had been raised by Singer: P. Singer, ‘War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law’, 42 *Columbia JTL* (2004) p. 521. representatives of private military companies do not seem concerned that their employees are at any risk of prosecution under the treaty: ‘Industry analysts have found that the Convention, which lacks any monitoring mechanism, has merely added a number of vague, almost impossible to prove, requirements that *all* must be met before an individual can be termed a mercenary and few consequences thereafter.

¹⁴² The Montreux Document, U.N. doc. A/63/467-S/2008/636, at Preface ¶ 6 (2008) *available at* <http://www.cda.admin.ch/psc>

¹⁴³ Cf. Chapter 4, The State in Voluntary Regulation

humanitarianism; the second is neutrality. I shall look at how each component relate to PMSCs norms.

On the one hand, using humanitarianism in international security derived legitimacy from an accepted conventional understanding that in fields like disarmament, the banning of entire categories of conventional weapons was carried out on humanitarian ideals¹⁴⁴. Borrie writes that:

Where limited progress in the disarmament and arms control domain has been achieved over the last decade, it tends to have been accompanied by humanitarian approaches, with assistance from international organizations, field-based practitioners, academic researchers and transnational civil society.

Second, the conception of PMSCs norms has been shaped by the neutrality of a state—Switzerland- and an organization—ICRC.

In the past, the practical development of the concept of neutrality allowed defining the problem of mercenarism as one where the state has a responsibility for the actions of its subjects or citizens. Thomson explained the problem as the result of “unintended and undesirable consequences for interstate politics”¹⁴⁵ and a problem that came from the supply

¹⁴⁴ Borrie, John, and Vanessa Martin Randin. *Disarmament as humanitarian action: from perspective to practice*. (United Nations Institute for Disarmament Research, 2006); Borrie, John. *Unacceptable harm: A history of how the treaty to ban cluster munitions was won*. (United Nations Publications UNIDIR, 2009).

¹⁴⁵ Thomson 1990:55. Authorizing non state violence in the international system served states interests but came with unintended consequences both for privateering, mercenaries, mercantile companies. Cf. Thomson, Chapter 3. For a critique of this approach, cf. Percy (2007) where she contends that one of the central problems with Thomson's neutrality-as-control-mechanism argument is that even in states without neutrality laws, the practice of selling or using mercenaries stopped

side rather than the demand side: “a state that allowed its citizens or subjects to serve in a belligerent’s military could not claim neutrality”.¹⁴⁶

The argument that I develop has continuity and differences vis-à-vis Thomson’s argument. The mechanisms of sovereignty and neutrality remain foundational to order in the international system. However, while in the seventeenth century externalities were raised from the supply side rather than the demand side, the current externalities originate *both* in the supply and demand sides.

On the one hand, on the demand side, abuses in the use of contractors led the United States to be involved in the Swiss initiative from the start, using it to inform domestic policy. On the other hand, on the supply side, neutral states like Switzerland identify the liability of being used as a base for activities in foreign conflict and crisis regions, a point to which I return below. It is the driver of state sovereignty that prompted Swiss foreign policy to join in with ICRC and press on for the initiative to be signed and accepted. Further, foreign enlistment created externalities to countries where Third Country Nationals were recruited.¹⁴⁷

Table 1: Externalities in Historical Perspective		
	Origin of Externality	
Century	Supply	Demand
XVIIth-XVIIIth	Individuals (mercenaries) could start wars	None

¹⁴⁶ Thomson 1990:59

¹⁴⁷ Cf. Chap. 5

XXth- XXIst	Contractors can compromise neutrality of <i>home</i> states; break domestic laws of (some) <i>territorial</i> states	Poor control of contractors can lessen military effectiveness of <i>contracting</i> states
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1.2.1 Actors

The process tracing of the Swiss initiative must necessarily start with the identification of the actors that are involved- i.e. the Swiss state and the two non-state actors. The International Committee of the Red Cross (from now ICRC) and the Geneva Centre for the Democratic Control of Armed Forces (from now DCAF), were the only non-state organizations present from the inception of the Swiss initiative. The DCAF is an international foundation established in 2000 on the initiative of the Swiss Confederation with the aim of improving security sector governance through security sector reform.

The definition of ICRC is more complex and more important for the purposes of this article. 2013 marked the 150th anniversary of the creation of the ‘International Committee for Aid to Wounded Soldiers’ by Henry Dunant and four others. The committee, later to become the ICRC, adopted the first Geneva Convention in 1864.

From a policy perspective, the ICRC is part of a complex organization with, on the one hand, a “NGO within a NGO (the Federation) and a transnational organization (the ICRC), which

as a private national organization in Switzerland sets its own global foreign policy.”¹⁴⁸ ICRC claims to act for the advance of human dignity and in the name of humanity. It also claims to be impartial, in the sense of responding to human suffering regardless of nationality, religion or any other human characteristics.

On the other hand, from a legal point of view, ICRC is an ordinary association under Swiss private law. Its private nature and its uniform nationality guarantee its independence vis-à-vis other States, and ensure the neutrality without which it could not operate. This also applies to the Swiss State, in whose neutrality the ICRC is generally embedded—without, however, being dependent on that State. Rather, both sides insist on strictly observing this independence irrespective of actual proximity.¹⁴⁹ Furthermore, *the humanitarian conventions to which the ICRC has actively contributed ever since its founding recognize its role, and invest it with specific assignments with the Community of Nations*, writes Torrelli. For this reason it is argued that ICRC today has a *functional international personality*.¹⁵⁰

1.2.2 Norms: First Stage of the Initiative

The first seeds of the Swiss Initiative can be found in ideas and norms, not in states interests.

In the next two sections I show how the difficulty of the Swiss initiative lay in overcoming

¹⁴⁸ ICRC is part of an organization, the International Red Cross, which consists of three components: the national societies, the International Federation of the Red Cross and Red Crescent societies and the International Committee of the Red Cross. It is a complex, hybrid NGO, as there is a NGO within a NGO (the Federation) and a transnational organization (the ICRC), which as a private national organization in Switzerland, sets a global foreign policy. Routledge History of International Organizations: From 1815 to the Present Day. P.54

¹⁴⁹ Probst R. (1989) P. 125

¹⁵⁰ Torrelli, M. Le droit international humanitaire, p.16-17 in Probst R. (1989: 125)

diverging state interests—between states wielding the most power in that market, the United States, and host states that had none.

At the origin of the Swiss initiative is a document discussed within the ICRC in 2004.¹⁵¹ Neutral humanitarianism embodied by ICRC drove the first phase of negotiation. It is an idea defined as an impartial, independent, neutral approach that operates in peace and war, and that can be tied to various laws or be conducted on the basis of a legal pragmatism.

The document was presented at the annual international conference of ICRC in 2004; it claimed that: “armed forces rely more and more both on civilians, with tasks that used to be strictly military, and on private security firms. This change is calling into question the accepted categories of actors in armed conflict.”¹⁵²

These questions led to a further reflection and eventually a special edition of the scholarly journal of ICRC.¹⁵³ The articles in the special edition suggested several important points: first, that the usefulness of the criteria for being a mercenary is limited; second, that human rights concerns are less likely to be about *whether an individual fulfills the criteria for being a mercenary and more likely to be focused on issues of corporate accountability, contract law and individual criminal responsibility under the laws of armed conflict*, as Clapham writes.¹⁵⁴ Third, another *approach is to think about how private military companies may trigger state responsibility under international law*.¹⁵⁵

¹⁵¹ CICR, Rapport pour la XXVIII conference international de la Croix-ROUGE et du Croissant Rouge, Geneve, Decembre 2003, RICR

¹⁵² CICR, Rapport pour la XXVIII conference international de la Croix-ROUGE et du Croissant Rouge, Geneve, Decembre 2003, RICR, March 2004, p.249. Author's translation. These are deliberative rather than operational meetings that take place every four years.

¹⁵³ *International Review of the Red Cross*. Volume 88, Issue 863, Private Military Companies - 01 September 2006

¹⁵⁴ Clapham 2006

¹⁵⁵ Ibid.

It was pragmatic neutral humanitarianism, presumably severed from nationalism and national interests, which led the ICRC to launch a series of expert meetings to clarify the notion of direct participation in hostilities.¹⁵⁶ “Direct participation” by civilians in combat erodes PMSCs protection against being targeted. It may also make them liable for criminal prosecution if captured. Determining status and what constitutes “direct participation” in conflict were problematic, however, and state actors and the ICRC did not always agree on how to interpret International Humanitarian Law’s guidelines. The “Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law”, published a year after the Document was signed, would eventually mirror the conclusion of the Montreux Document.¹⁵⁷

1.2.3 Second Stage of the Initiative

International Aspirations

The Swiss Federal government considered the appropriateness and potential of new *international, binational and supranational initiatives*.¹⁵⁸ It claimed that to date, there had been no

¹⁵⁶ Available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, last accessed September 20th 2014

¹⁵⁷ *The status of the personnel of private security and military contractors in armed conflict situations is to be determined by International Humanitarian Law on a case by-case basis, with particular regard to the nature and circumstances of the functions in which they are involved. However, there is a presumption that personnel of PMSCs are protected as civilians under IHL unless they are incorporated.* In Williamson, Jamie A. "Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities." *Duke J. Comp. & Int'l L.* 20 (2009). P. 465. One of the criticism can be found in Watkin, Kenneth. "Opportunity lost: organized armed groups and the ICRC direct participation in hostilities interpretive guidance." *NYUJ Int'l L. & Pol.* 42 (2009): 641. For a response, cf. Melzer, Nils. "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities." *NYUJ Int'l L. & Pol.* 42 (2009): 831.

¹⁵⁸ Report by the Swiss Federal Council on Private Security and Military Companies, December 2005 p. 57. Employees of private security companies had been among those participating in those human rights violations. Available at: http://psm.du.edu/media/documents/national_regulations/countries/europe/switzerland/report_swiss_2005_private-security-and-military.pdf. Accessed April 2014

forum to bring parties together to discuss approaches to the establishment of both international and national standards.

This was only partly true. As a matter of fact, the African Union (AU) had just convened a meeting of experts to review the organization's legal instruments, including the 1977 Anti-Mercenary Convention.¹⁵⁹ However, it was not a 'forum to discuss approaches;' the A.U. was interested in seeking to control conventional 'mercenaries' of the type highlighted by the 2004 coup attempt in Equatorial Guinea¹⁶⁰.

In 2005, the UN also started to re-engage in this process from a clean slate. With the establishment of a second *Special Rapporteur on the Use of Mercenaries*, and then, of a new Working Group that succeeded the mandate of the Special Rapporteur. The UN stopped assuming PMSCs and mercenaries were one and the same.

In the decisive year of 2005, the Swiss initiative had also come to the conclusion that the available conventions and protocols regarding mercenarism would suffice, and secondly that PMSCs were corporate entities. This was no easy step. From the initiative's inception, in fact, the textbooks in preliminary meetings could make a reference to private firms only via the concept term of mercenarism. The subtle and crucial juncture occurred and is described by Blamond: "in the 'ouvrage de référence', Sassoli and Bouvier- 'Un droit dans la guerre?'- security firms are not present in the index and are not referred to, except by way of a reference to mercenarism."¹⁶¹

¹⁵⁹ This presented an opportunity for the AU to simultaneously address the challenges posed by PMSCs in the region (Gumedze, 2011)

¹⁶⁰ Cf. Chapter on South Africa

¹⁶¹ Balmond, L., p115, fn 6. The full citation is Sassoli and Bouvier, "Un droit dans la guerre?" CICR, Geneva, 2003. This work does not appear, however, in the bibliography used for the preparation of the first meeting of expert, which has become available at:

Swiss Domestic Politics

In 2005, the crucial shift occurred and humanitarian concerns and preoccupations with International Humanitarian Law were no longer the sole drivers of the initiative. When the Swiss diplomacy initiated the intergovernmental consultation, with the cooperation of ICRC, it prioritized its own national security preoccupations—i.e. “the issue of private security companies that could use Switzerland as their base for activities in foreign conflict and crisis regions.”¹⁶²

On the one hand, the first motivation stressed the need to ensure the safety of citizens abroad, particularly in conflict zones; Switzerland must “itself on occasion have recourse to the services of private security companies.” Similar strategic interests are found in the second motivation: “Switzerland has an interest not to be used as a base for illegal or dubious operations abroad” and the government should respond to charges that “private military or security companies active in conflict zones could be operating from within Switzerland.” Thus, even if normative foundations are still mentioned, the Swiss initiative had already become an amalgam of priorities.¹⁶³

https://www.eda.admin.ch/content/dam/eda/en/documents/topics/Comprehensive-bibliography-private-military-and-security-companies_en.pdf, Accessed January 18, 2015

¹⁶² The report found only some evidence. In the Basel region, three licensed companies known to be operating in war zones or crisis areas. Another private security company domiciled in canton Ticino made an unsolicited offer for its services to the Federal Department of Foreign Affairs while operating from Ticino without a license, according to the cantonal authorities.

The company elected domicile in Ticino as a way of gilding its image (Swiss neutrality). Report by the Swiss Federal Council on Private Security and Military Companies, December 2005.

¹⁶³ *The implementation and, where necessary, the development of international law, especially human rights and international humanitarian law, is among Switzerland's traditional concerns.* Ibid, pp.57-8

In fact, the 2004 coup in Equatorial Guinea had involved a partly Swiss-owned firm and some employees were arrested in Zimbabwe.¹⁶⁴ The coup created the impression that PMSCs were really able to act as a conduit for mercenaries of the old-fashioned kind: the mercenaries involved were mostly former PMSCs personnel and some were still employed by a PMSC as in the case of two employees of the company Meteoric Tactical Systems providing security to diplomats of Western Embassies in Baghdad-among whom the Ambassador of Switzerland.¹⁶⁵

Closer to the U.N. evolving policy position, Del Prado stated that: “Equatorial Guinea is a clear example of the link between the phenomenon of mercenaries and PMSCs as a means of violating the sovereignty of states.”¹⁶⁶

Thus, during the second stage of the Swiss initiative, ideals and state interests became fused. From 2005, one could presume a cooptation of the Swiss initiative. Switzerland as neutral state had a specific state interest—i.e. restraining other states and private individuals from using its territory and resources for hostile purposes.

Final stage: Montreux and the ICoC

In September 2008, the Swiss initiative produced the Montreux Document. Firms agreed to the ICoC and a governing Association of states and firms was created, called the Montreux Document Forum¹⁶⁷. The Code consists of seventy articles that encompass a wide range of

¹⁶⁴ Roberts, *The Wonga Coup*, 144

¹⁶⁵ Working Group, Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10293&LangID=E#sthash.XLNljEb1.dpuf>

¹⁶⁶ Presentation given by Gomez del Prado in Geneva on November 3, 2010. Available at: <http://truth-out.org/archive/component/k2/item/93553:beyond-wikileaks-the-privatization-of-war> Accessed January 8th 2015. Also in: Gómez del Prado, José L. "A UN Convention to regulate PMSCs?" *Criminal Justice Ethics* 31.3 (2012): 262-286

¹⁶⁷ Cf. Chap. 3 and 4

obligations firms must meet, including the respect of human rights principles, for example the prohibition of torture, discrimination, human trafficking and other cruel, inhuman or degrading treatment.¹⁶⁸

The negotiation of the ICoC was itself long and complex and is the result of a split in the negotiation.¹⁶⁹ While these standards are part of the regime complex described in chapter four, all have a more limited focus in the Montreux Document. Indeed, companies that maintain and operate weapons systems, provide prisoner detention services, and train local forces are expressly excluded.

1.3 Argument in Historical Perspective

1.3.1 The Soft Power of Institutions

As mentioned at the beginning, Thomson described the contract system as a problem of state control, one that spurred “unintended and undesirable consequences for interstate politics”. States had to make individuals accountable under their jurisdiction or be drawn into other states’ wars. In the Middle Ages, the *condotta* or contract system allowed nobles and cities to hire private soldiers, while the Chartered Companies of the seventeenth and eighteenth centuries often employed military and police capacities. Thomson writes that sovereignty and

¹⁶⁸ ICoC, § 35 on torture, ICoC, § 42 on discrimination, ICoC, § 39 on human trafficking

¹⁶⁹ Whereas the Montreux Document refers throughout to ‘Private Military and Security Companies’ (PMSCs). The ICoC adopts the term Private Security Companies and other Private Security Service Providers (collectively, PSCs). It generally aims to avoid association with military activities.

neutrality became the mechanism to control and eliminate the externalities of non-state violence.

The U.S. Neutrality Act of 1794 was the defining moment for the notion of neutrality and the control of mercenarism.¹⁷⁰ Violation of the obligation of neutrality, through permitting the recruitment or enlistment of mercenaries within one's national territory with the purpose of armed activity in another state, was deemed to constitute an act of belligerence. This practice was eventually codified into the Hague Convention.

Switzerland's foreign policy has been characterized by neutrality as a permanent feature since 1515, a status that was internationally recognized with the Vienna Congress in 1815.¹⁷¹ In this spirit, the coherence and significance of the Swiss initiative should be noted. Switzerland means to control PMSCs on its territory, and aims at not being "used as a base for illegal or dubious operations abroad" to protect its respectability and neutrality.¹⁷²

In contrast to Thomson's description, it was not only the inter-state system that proposed rules and practices for PMSCs governance but the neutrality of an international organization. The ICRC, the guardian of the Geneva Convention, gave the traction. ICRC's often stated claim that the Montreux Document has a purely humanitarian purpose cannot distract from the motivations of state control.

¹⁷⁰ The Act remains in force and the U.S. government has recently enforced it in Africa, in the Gambia, in December 2014; cf. <http://www.justice.gov/opa/pr/third-defendant-charged-violating-neutrality-act-planning-and-participating-plot-overthrow>).

¹⁷¹ Before the Vienna Congress, since the defeat in the Battle of Marignano in 1515 and in particular since the Thirty Years War in the 17th century.

¹⁷² Report by the Swiss Federal Council on Private Security and Military Companies, December 2005, op. cit.

A combination of states' interests, norms and institutions existed. Certainly, Switzerland had built stronger networks and historical credentials by hosting and providing judges for ad hoc courts.¹⁷³ It frequently represented other states with "protective power mandates".¹⁷⁴ Nonetheless, the seal of the ICRC strengthened the Montreux Document in an extraordinary way. Avant that: "The US government . . . saw the legitimacy that the ICRC, the Swiss and DCAF had as crucial to the success of the governance initiative. They draw sharp contrasts between what they say were poor decisions to use hard power to generate unilateral rules (such as the infamous CPA Order #17) and current choices to throw their influence behind processes that are seen as more legitimate and representative."¹⁷⁵

The ICRC was the indispensable institutional pillar, unlike other an inter-state organizations, such as those that eventually signed the Montreux Document- the European Union, The North Atlantic Treaty, the Organization for Security and Co-operation in Europe.

Subsection 1.3.2 Neutrality in Comparative Perspective

Before analyzing some difficulties in the Swiss initiative, two examples are useful to illustrate how the challenges of neutrality increase at moments of historical juncture—be it the rise of fascism, decolonization, the end of the Cold War, or the post-9/11 political climate.

The first episode is the Italo-Ethiopian conflict (1935-1936). During the war, members of the ICRC often held or exhibited pro-Italian sympathies, and eventually the ICRC as an

¹⁷³ Most famously in 1872 in the Alabama case between the U.S. and Great Britain

¹⁷⁴ Since the Franco Prussian war , these engagements peaked during World War II when Switzerland held over 200. In Graf, Andreas, and David Lanz. "Conclusions: Switzerland as a paradigmatic case of small-state peace policy?" *Swiss Political Science Review* 19.3 (2013): 410-423.

¹⁷⁵ Avant 2013 p.758. Note: CPA Order # 17 is a legislation signed in 2006 that was intended to provide immunity to contractors

organization leaned towards the Italian fascists.¹⁷⁶ Another historical example is the Nigerian civil war—a context where the ICRC swayed inadvertently towards Biafran independence. The problem for the ICRC in Biafra was not encouraging compliance with the law of war, but providing enough relief supplies to prevent starvation.¹⁷⁷ Yet, the Biafran leaders' manipulation of the relief effort¹⁷⁸ led to the expulsion of the ICRC representative.¹⁷⁹ As Forsythe writes, the ICRC performed so poorly that its neutrality was compromised; “more Biafra would have led to the demise of the organization.”¹⁸⁰

These examples illustrate both the challenges for the organization and the fluidity of the concept of neutrality in the operational context. Arguably, it is perhaps only *political neutrality* that ICRC can aspire to.¹⁸¹ The challenge to maintain neutrality is higher at points of juncture—and during these moments of transition some slips may occur.¹⁸² A closed-mouth interpretation of neutrality has been rejected by the many organizations that favored other humanitarian philosophies and an ethical obligation towards on speaking out.¹⁸³

¹⁷⁶ Baudendistel R. *Between Bombs and Good Intentions: The Red Cross and The Italo-Ethiopian War, 1935–1936*. (Routledge, 2006)

Further lack of neutrality was demonstrated when the ICRC conducted an investigation of the bombing of Red Cross hospitals in the field.
¹⁷⁷ *Nigerian federal government issued a code of conduct to its soldiers which required that Biafran prisoners be 'treated as prisoners of war'. Instructions were given on the protection of civilians, mosques, churches, foreigners and private property. Foreign mercenaries, however, were 'not to be spared'. The Red Cross (ICRC) made fairly regular visits to detainees held by the government.* (Forsythe, D. P. *Humanitarian Politics: The International Committee of the Red Cross*. (Baltimore: Johns Hopkins University Press, 1977) On the famine intervention, cf. Chandler, David G. "The road to military humanitarianism: how the human rights NGOs shaped a new humanitarian agenda." *Human rights quarterly* 23.3 (2001): 678-700. After some limited involvement at the beginning of the war, Biafra became the ICRC's first large-scale relief operation

¹⁷⁸ counting on the “reluctance of Lagos to attack the night-time weapons flights for fear of hitting Red Cross planes in the process. Forsythe 2005:66

¹⁷⁹ A shooting incident caused the ICRC to pay closer attention to the Fourth Geneva convention and its Article 23 (...) and that the established government in a civil war had the legal right to set the terms for inspection for relief flights into the secessionist area. in Forsythe, D. P. *Humanitarian Politics: The International Committee of the Red Cross*. (Baltimore: Johns Hopkins University Press, 1977). p. 192. For a full account of ICRC work during the Nigerian civil war, cf. pp.180-196

¹⁸⁰ Forsythe 2013. He cites three main “blots on the record” of neutrality: conservatism and racism against Ethiopia during the Italian invasion; cooperation with the Nazis that prevented a discreet diplomacy in favor of the Jews during the genocide; the tilt towards Biafra during Nigerian civil war.

¹⁸¹ For a critique, cf. Franke, Mark FN. "Responsible Politics of the Neutral: Rethinking International Humanitarianism in the Red Cross Movement via the Philosophy of Roland Barthes." *Journal of International Political Theory* 6.2 (2010): 142-160. *ICRC's commitment to neutrality leads it to a broad yet significant political partiality and, thus, a highly politicised role in international conflict. (...) The irresponsibility to these terms is rooted well within ICRC's simultaneous admission to being politically involved and interested in its support for humanity, while assuming that humanity itself can serve as an apolitical guide to such action. It presents an acknowledged political humanitarianism while taking the position that the ground of this work, humanity, is itself neutral.*

¹⁸² *The perception of bias made the ICRC's relationship with most communist countries difficult throughout the Cold War. ...Is this the same pattern we will see in the War on Terrorism? If this pattern is repeated the ICRC must understand the limits of its neutrality, and further should understand how it is perceived and adapt to these circumstances.* Forsythe. Op. Cit.

¹⁸³ I refer to the creation of MSF- Doctors Without Borders in 1971. Cf. Vallaey, Anne. *Médecins sans frontières: la biographie*. Fayard, 2004

I have thus outlined one factor that may have *directly* affected the neutrality of ICRC vis-à-vis the Swiss initiative—the changes post-9/11; a second one has an *indirect* effect—the shifting foreign policy of Switzerland.

Over the years, Switzerland shifted away from an isolationist interpretation of neutrality¹⁸⁴ and the traditional asymmetry in Switzerland integration to the world was greatly reduced. In 2002, Switzerland became a full member of the UN;¹⁸⁵ it started to participate to military peacemaking, and two rounds of bilateral agreements with the EU constituted a major step towards European integration.¹⁸⁶

The neutrality of ICRC depends upon its relationship to Switzerland at the functional and symbolic level. On the one hand, the very name and emblem depended on the founders' choice of the cross as a symbol—it was the reverse of the Swiss flag and a well-recognized symbol of neutrality in Europe in 1864¹⁸⁷. On the other hand, the administration of ICRC depends upon a president who is generally a former Swiss diplomat¹⁸⁸ and the single nationality, Swiss, of the ICRC Assembly.¹⁸⁹

¹⁸⁴ Goetschel, Laurent. 2013.

¹⁸⁵ For a table of the integration of Switzerland in the UN system, cf. Gabriel and Fischer, 2003, pp. 55-6

¹⁸⁶ Kriesi and Trechsel (2008)

¹⁸⁷ The current symbol comprises the symbols of the Red Cross, the Red Crescent and the Red Crystal. The latter was added as an additional symbol with equal status with a third additional protocol to the Geneva Conventions in 2005. The Red Crescent had been formally recognized in 1929

¹⁸⁸ Although they have all been chosen and co-opted by the ICRC. Further, they have not been seconded to Geneva by Bern. They have all given up their position in the Swiss administration, except in one case during the 1940s. Gasser in Gabriel and Fischer, P.121

¹⁸⁹ For a description of the office of the president and the assembly, cf. Forsythe, 2014, chap. 2

Thus, post-9/11 changes challenged the *modus operandi* of ICRC and its neutral Swiss ground shifted. Yet the force of neutral humanitarianism could be reliant on its institutionalization and was able to function with political and bureaucratic autonomy.

Subsection 1.3.3 Neutrality in Action: between Pro and Anti-Americanism

The Swiss initiative succeeded in keeping major powers at the negotiating table even if the U.S. had no interest in international regulation.

The most direct externalities for states could be framed in terms of national interest and the military ineffectiveness of contractors. The problem of military effectiveness is shown in table 1 as a possible externality for *contracting* states. Molly Dunigan's study showed that armed security contractors tend to decrease effectiveness in situations of co-deployment with the military due to a combination of structural, identity and ethical issues. The effect may be different, she wrote, when PMSCs are deployed to support a host nation force.¹⁹⁰

Thus, military effectiveness could have shaped U.S. national interests or alternatively, a concern for efficiency. The Commission on Wartime Contracting, established by Congress in 2008, found that up to \$60 billion- or about one of three dollars spent—was lost to waste or fraud. Either framing would not suggest any substantial relevance for international reform.

¹⁹⁰ Cf. Dunigan 2011. Other studies worried about control over force (Avant 2005; Isenberg 2009)

However, observers recall that while the US did not join the process to develop regulations, preferences changed along the way: “during the multi-stakeholder processes (...) there was demand for US regulators to “do something” from Congress, new ideas about what the US might do emerged from its interactions with others”.¹⁹¹

The following narrative emphasizes two legitimacy aspects of the institutional brokerage by the proponents of the Swiss initiative: the first at the domestic level, the second at the global level. Each shows that institutionalized neutrality was able to affect the United States— “the 800 pound gorilla in the room.”¹⁹² They also show the delicate balance that ICRC sought to maintain, as well as the attacks sustained by ICRC—*not* by the Swiss government—as it defended neutral humanitarianism.

ICRC under attack

The first feature in the orchestration of the Swiss initiative is that ICRC opposed certain aspects of U.S. policy and arose to the status of a potentially anti-American institution. In the midst of growing polarization in world politics, the perceived association between anti-Americanism and opposition to U.S. policy did not mean that anti-Americanism had anything to do with ICRC advocacy.¹⁹³

As far as the Swiss initiative went, the ICRC, more than the Swiss government, was taking the heat.¹⁹⁴ The ICRC was not anti-American; yet, it came to be antagonized because of the

¹⁹¹ Instead, US preferences for this approach to regulation emerged during these multi-stakeholder processes. Though there was demand for US regulators to “do something” from Congress, new ideas about what the US might do emerged from its interactions with others. Avant 2014, forthcoming

¹⁹² Avant 2012

¹⁹³ Katzenstein, and Keohane, eds. *Anti-Americanisms in world politics* (Cornell University Press, 2007). The authors define Anti-Americanism as a psychological tendency to hold negative views of the United States and of American society in general. p. 275. For a review of the main definitions, cf. Chiozza (2009) *Anti-Americanism and the American World Order*, ch. 2.

¹⁹⁴ Author’s interview, with ICRC official, Geneva, July 2014

criticisms towards detention at Guantanamo, which led to a position paper in U.S. policy circles that advocated a restructuring of the ICRC.¹⁹⁵

Despite the spread of anti-American views, the extent of U.S. collaboration with multilateral fora intensified greatly. Cooperation in counterterrorism and security with the U.N., NATO and at the G8 summit meetings increased; partnerships with organizations such as the World Bank and the IMF remained intact.¹⁹⁶ Anti-Americanism did not prevent the signing of the ICC treaty either.¹⁹⁷ Nor did it influence the ICRC. Yet, a bias developed towards the ICRC. Here again, Forsythe's account is illuminating:

Clearly there was a determined effort in some American political circles to discredit the ICRC, despite the fact that historically it had been widely recognized as mostly neutral and certainly discreet. During the Cold War if it had strayed from neutrality in places like Korea and Southeast Asia it had tilted toward the West.

The post-9/11 interventions blurred accepted distinctions and categories spurring questions on the applicability of International Humanitarian Law to armed conflict. Forsythe writes that the Bush administration saw International Humanitarian Law and the international organizations that sought to apply it, as in league with the enemy: “what others saw as normal defense of normal law . . . , some others saw as ‘lawfare’, the pursuit of an anti-American agenda by enemies. . . . The ICRC has become the leading practitioner of ‘lawfare.’¹⁹⁸

¹⁹⁵ The restructuring was highly unlikely since an all-Swiss Assembly contributes to the neutrality of the organization but the proposal was one of many frequent attacks . This paragraph draws from Forsythe, 2011: 165-6

¹⁹⁶ Katzenstein, and Keohane. P. 281, 283-6. Also: *European governments not only declined to block the nomination of Paul Wolfowitz (often referred to as the architect of the Iraq War) but expressed considerable support for him before his official selection.* P. 288

¹⁹⁷ Kelley 2005 in Katzenstein, and Keohane

¹⁹⁸ Forsythe. D.P. *The politics of prisoner abuse: The United States and enemy prisoners after 9/11.* Cambridge University Press, 2011) p.164. He adds, citing Goldsmith, *The Terror Presidency: the weak ‘enemy’ using asymmetric legal weapons was not al Qaeda, but rather our very differently motivated European*

'Lawfare' was initially conceived as a neutral term and defined as a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective. The re-invention of the meaning of the term, alternative to its original neutral characterization, brought forward opposing academic camps trying to recapture its meaning.¹⁹⁹ It is in the context of these diverging 'ideas about war' that the first meeting of experts takes place. The U.S. representative calls into question the authority of International Humanitarian Law:

*I see a danger ... in frequent reference to the law of war relating to international armed conflict, either as the applicable law or the law to which PMC/PSC should be trained. ... We need to avoid establishing the law of war as the proper reference point, given that in all likelihood 99% of PMC/PSC employment occurs outside the major combat operations phase of international armed conflict.*²⁰⁰

The applicability of the International Humanitarian Law to terrorism would entrench the idea that armed conflict is normal and routine. "If efforts to combat terrorism in general always involve armed conflict, then it is a conflict with no boundaries in time or space. It takes place everywhere, has no logical culmination and irrevocably blurs the distinction between civilian and combatant that is so important to the Geneva convention".²⁰¹

and South American allies and the human rights industry that supported their universal jurisdiction aspirations. Rumsfeld saw this form of lawfare as a potentially powerful check on American military power

¹⁹⁹ For a review, cf. Scharf, Michael, and Elizabeth Andersen. "Is Lawfare Worth Defining-Report of the Cleveland Experts Meeting-September 11, 2010." *Case W. Res. J. Int'l L.* 43 (2010): 11.

²⁰⁰ Records of the first meeting of experts (January 2006), W. Hays Park, *The Perspective of Contracting and "Headquarters" States*, available at: https://www.eda.admin.ch/content/dam/eda/en/documents/topics/Presentation-perspective-of-contracting-headquarters-states_en.pdf, Accessed 20 November 2014

²⁰¹ Parry and Duffy. In Forsythe fn. 18, p. 169

In this sense, Cockayne wrote that the Montreux Document was an achievement as a reaffirmation by the United States, of the applicability of International Humanitarian Law and International Human Rights Law to contemporary armed conflict, “given the uncertainty around the US position on such issues between 2003 and 2008”.²⁰² The Swiss initiative was indeed signed and the Montreux Document informed the U.S. reform process and contributed to the growing global standards reflected in a “web of regulatory interaction which is American power at work, but power bound to general principles and processes.”²⁰³

Ambiguity and risks for ICRC

There was an opposite risk to being perceived as anti-American—i.e. that support to the Swiss initiative, outside of U.S. domestic politics, may have been perceived as a contribution to legitimate the U.S. interventions. ICRC could have been perceived as helping normalize contracting practices in the war effort; and second, as supporting—albeit indirectly—a mostly Western industry. Indeed, for ICRC, it “was by no means certain,” as Cockayne writes, “that it would serve as a driver of intergovernmental discussion on a topic with as controversial a history as the ‘mercenary issue.’”

There are three points to this argument. First, the participation of ICRC to an initiative of regulation like the Montreux Document had few antecedents, as Cockayne himself acknowledges: “despite the sui generis roles of the ICRC as the guardian of International Humanitarian Law and the Swiss Federation as the Depository of the Geneva Conventions, such a cooperative initiative in fact had few precedents.”²⁰⁴

²⁰² Cockayne, Op.Cit., p. 401. *One US government participant in the process pronounced the Montreux Document ‘a significant achievement of historic importance’*

²⁰³ Avant, 2012

²⁰⁴ Cockayne Op. Cit., p. 418.

In general, the ICRC preferred the role of passive observer—rather than active participant—in intergovernmental and multi-stakeholder discussions, as in the case of Small Arms and Light Weapons, and more recently, the Arms Trade Treaty.²⁰⁵

Second, it is noted that since 2001 the ICRC had been an observer of the *Voluntary Principles on Human Rights and Security*, an initiative meant to use soft law to clarify norms in the use of security by the extractive firms. At the inception, the ICRC had declined to participate formally²⁰⁶. Voillat writes:

*The ICRC did not wish to be a formal member of the Voluntary Principles: it considered that formal membership in an initiative that was constituted exclusively of Western governments, companies, and organisations was not suitable with regard to the institution's principle of neutrality*²⁰⁷.

Further, and this is perhaps the most ambiguous aspect, the Swiss initiative came to indirectly include the active participation of the security industry, in a second stage.²⁰⁸ The ICoC originated in the withdrawal of the industry from the inter-state negotiations of the Swiss initiative, an event that had not been planned at the outset. The Swiss government, not the ICRC, convened the Code but ICRC welcomed nonetheless the ICoC “as an initiative aimed at ensuring adherence by PMSCs to recognized standards of International Humanitarian Law

²⁰⁵ An exception of active participation is the International Coalition for the Ban on Landmines. Concern with Anti-Personnel land mines initially grew out of work on humanitarian laws of conflict as carried out chiefly by the ICRC. Price, R. (1997:7)

²⁰⁶ Interviews with ICRC representatives, January 2014, Johannesburg and Geneva

²⁰⁷ Voillat 2012: 1098

²⁰⁸ This raised the risk that ICRC- or Switzerland- could be seen as contributing to legitimate PMSCs. The question may be settled only with time as the Montreux Document extends its membership or else remain confined to an almost *exclusively Western* initiative, as the Voluntary Principles, which indirectly supports a mostly Western industry. The Swiss initiative did not set out to be exclusively Western, nor did it set out to encourage the market for private security but this could be its long-term, unintended result.

and human rights law, thereby contributing to the better protection of victims of armed conflict and situations of violence below that threshold.”²⁰⁹

This story of the relationship between the ICRC and the United States shows the force of institutionalized ideas. Acting in the footsteps of Clara Burton, whose campaign for the Geneva Convention in post-Civil War Washington encountered infinite obstacles,²¹⁰ the ICRC proposed an internationalist vision that survived strong attacks from domestic US groups, and tried to balance the internal dilemmas that the participation posed at the global level.

Conclusion

This chapter outlined an ideational and institutional approach to the construction of PMSCs governance. Purely interest-based explanation cannot entirely explain the origins and outcomes of the Swiss initiative. Such explanations fail to account for variation in state behavior. Why was the U.S. government induced to collaborate to an initiative meant to contribute to the defense of humanitarian norms? As Avant writes: *theories of hegemony are unable to explain why the US would (...) move from resisting to supporting governance in military and security services.*²¹¹ Ideas as “focal points” can instead provide an explanation of regulation. As I have

²⁰⁹ 31st International Conference of the Red Cross and the Red Crescent (Geneva, 2011). P.35 Op. cit.

²¹⁰ Clara Burton, a helper during the Civil War, and the founder of the US Sanitary Commission and later of the American Red Cross, on how she campaigned for the US to sign the GC, cf. Jones, Marian Moser. *The American Red Cross from Clara Barton to the New Deal*. JHU Press, 2012. Ch. 2

In the face of her first rejection, she introduced disaster relief as a component that could strike a chord in a country that did not face the dangers of perpetual war as European nations did.

Robert Lincoln, son of slain president, gave in to Barton tenacious campaigning and the US eventually signed the GC in 1882 that adhered to a strict interpretation of the Monroe doctrine and recoiled from any “entanglements” with foreign organizations p. 28

²¹¹ Avant, D. (Forthcoming, *Security Studies*) Netting the Empire: Relationships and US Roles Governing Small Arms and Military and Security Services

shown, neutral humanitarianism in actors' preferences and policy choices, helped inspire and constrain a range of a state's foreign policy behaviors²¹².

In fact, international organizations, like the International Committee of the Red Cross (ICRC) and the International Maritime Organization (IMO)²¹³, were crucial in advancing the regulatory framework around PMSCs. No organization wanted to be driver of intergovernmental discussion on topics with contentious histories, like mercenarism or piracy. Yet, these complex International Organizations were capable of shaping some outcomes and preventing others.

In historical perspective, the Swiss initiative tried to deal with some of the new “unintended and undesirable consequences” of non-state violence suggesting an analogy with Thompson's described mechanism for the suppression of mercenaries and pirates practices of seventeenth century states. The analysis must be complemented since the Swiss initiative is probably better seen as originating in a mix of *both* demand and supply side externalities. On the one hand, on the demand side, the abuses in the use of contractors led U.S. policymakers to spearhead inquiries and to be involved in the Montreux process from the start, using it to inform their actions and eventually US regulation. “The Montreux language quickly took hold as the dominant frame for looking at PMSCs”²¹⁴. On the other hand, on the supply side, neutral states like Switzerland risked being used a base for activities in foreign conflict and crisis regions.²¹⁵ This was an important driver that prompted Swiss foreign policy to defend the country's neutrality.

²¹² Goldstein and Keohane, *Ideas & Foreign Policy: Beliefs, Institutions, and Political Change*, p. 24-26. I return to this point and I articulate this approach in full in chapter three

²¹³ Cf. Part II, chapter 5

²¹⁴ Avant, 2012, op. cit, p.34

²¹⁵ *The report found only some evidence.* In the Basel region, three licensed companies known to be operating in war zones or crisis areas. Another private security company domiciled in canton Ticino made an unsolicited offer for its services to the Federal Department of Foreign Affairs while operating from Ticino without a licence, according to the cantonal authorities.

The company elected domicile in Ticino as a way of gilding its image (Swiss neutrality). Report by the Swiss Federal Council on Private Security and Military Companies, December 2005.. Available at: http://psm.du.edu/media/documents/national_regulations/countries/europe/switzerland/report_swiss_2005_private-security-and-military.pdf. Accessed April 2014

Chapter 2: The United Nations as actor of governance

This chapter traces this process that led to the proposed accommodation of private force with a Draft Convention. The United Nations preferences evolved independently of the Swiss initiative in spite of some interaction. An international treaty aimed at setting the highest standards for PMSCs eventually failed to gain support. I use narratives and tables to illustrate how the U.N. gradually shifted to accept a distinction between ‘mercenaries’ and PMSCs, and how the shift informed the Draft Convention. Choices were bounded by the highly institutionalized anti-mercenary norm; limited by the problem of naming the protean organizations increasingly known as PMSCs. Key events created continuity and change- the Iraq war, the Baghdad bombing, and the reform of the Human Rights bodies in particular.

2.1 U.N. practices and policies

2.1.1 Evolution of practices

Significance

In what follows, I distinguish analytically between the U.N.'s own use of PMSCs in operations and peacekeeping and the formal treaties and conventions that it has implemented or proposed, but I note the interactions between the two arenas. The question of U.N. practice is important because of the potential role in conveying legitimacy and standards. The U.N. employment of PMSCs can command market-power and shape global standards and regulations, especially if it decided to outsource more of its peacekeeping.²¹⁶ On the other hand, the United Nations is the highest international body able to propose and create multilateral treaties.

Demand for Security in African Crisis

The origins of the Draft Convention can be seen in the political economy outlined in the introduction: an increased demand for interventions led to a gradual shift to the use of PMSCs as member states' shifted their policies on contracting. In the nineties, the United Nations oversaw an explosion in peace operations as evidence to the numerous demands and

²¹⁶ It is argued that peacekeeping could become the largest market for private military force in the near future. McFate 2014:163

expectations, amidst the challenges of Rwanda or Srebrenica. The first marked increased use of PMSCs- in the form of armed guards- occurred after the Somalia crisis.

The humanitarian response in Somalia initially saw the deployment of thousands of US troops to permit humanitarian relief operations. The US withdrawal was a turning point for NGOs and UN agencies required to continue their work. PMSCs obtained more contracts to provide security, logistical support and training in conflict and post-conflict contexts²¹⁷, as well as fulfill security and policing functions especially within peacekeeping operations and demining²¹⁸. As of 2014, there were around 30 unarmed and armed companies used in peacekeeping missions and special political missions and globally, the United Nations used armed PMSCs in three countries and unarmed PMSCs in 12 countries where there are peacekeeping missions and 11 countries where there are special political missions.²¹⁹

Limits to the expansion of private peacekeeping

At least three elements prevented deeper changes in the policies of contracting PMSCs. The most important one is the lingering existence of diffuse anti-mercenary feelings, which shaped the dominance of the General Assembly (GA) approach. As Percy writes: “ the GA has (...) opposed all types of private force, the Security Council has dealt with mercenaries only in

²¹⁷ SSR-related services related to peacekeeping (Østensen 49-50) or intelligence (Singer 2003:182). See e.g. Christopher Spearin, ‘UN Peacekeeping and the International Private Military and Security Industry’, *International Peacekeeping*, vol. 18, no. 2, 2011, p. 196–209; Oldrich Bures, ‘Private Military Companies: A Second Best Peacekeeping Option?’, *International Peacekeeping*, vol. 12, no. 4, winter 2005, p. 533–546; Malcolm Patterson, ‘A Corporate Alternative to United Nations Ad Hoc Military Deployments’, *Journal of Conflict & Security Law*, vol. 13, no. 2, 2008, p. 215–232. The UN approached a PMSC to provide 7000 Gurkha to protect relief in Somalia. Cited in Baum 2014. Eventually not hired

²¹⁸ Ghebali, Victor-Yves. "The United Nations and the dilemma of outsourcing peacekeeping operations." *Bryden, A and Caparini, M (eds) (2006). Spearin, Christopher. "Private, armed and humanitarian? States, NGOs, international private security companies and shifting humanitarianism."* *Security Dialogue* 39.4 (2008): 363-382.

²¹⁹ U.N. A/69/338, Para 11. The total estimated budget for 2013/2014 for the use of private security companies is approximately \$42,125,297 including \$14,015,520 for armed services (only in Haiti and Afghanistan)

terms of the threat they pose to international security, and only once dealt with a private military company”.²²⁰

Percy summarizes this process:

*The GA has taken the lead in dealing with new manifestations of private force. This hostility has closed off one potential avenue for the Council: the use of private force in peacekeeping operations in combat. (...) the GA's response has meant that its approach has become dominant within the UN, making regulation of the private security industry and the continued legal control of mercenaries more difficult.*²²¹

Secondly, there was still insufficient domestic and international legislation regulating the activities of PMSCs.²²² Third and last, but not least, the inter-state system is an essential obstacle: under Article 42 of the Charter, the Security Council has the monopoly of the legitimate use of force for the maintenance of international peace and security.²²³

2.1.2 Policy development for operations

I now turn to describing the evolution of U.N. policies in the first decade of the twenty-first century before turning to the Draft Convention.

²²⁰ Percy 2014:633. She adds that the SC became involved only when there was a threat to territorial integrity, a concern of internationalization of conflict, threats to regional stability (p.635)

²²¹ Ibid. p. 636

²²² I return to this point for a synthesis in chapter 3.

²²³ For a review of the legal arguments, cf. Sossai, Mirko. "The Privatisation of 'the Core Business of UN Peacekeeping Operations': Any Legal Limit?." *International Community Law Review* 16.4 (2014): 405-422. *On whether the law applicable to UN peace operations allows the privatisation of mandated tasks can be grouped around three main analytical questions: if UN peacekeeping forces must be State organs; if the basic principles of UN peacekeeping constitute an inherent limitation to the resort to PMSCs; finally, if the Security Council is allowed to delegate its powers under Chapter VII of the UN Charter to a private actor, by authorising a PMSC to carry out a peace operation.* (p.417)

The absence of clear policies characterized much of the use of PMSCs by the U.N and a variety of practices emerged based on missions, assessments and on agencies' preferences. At least three documents can help reconstruct such evolution: the IASC guidelines, the Field Security Handbook and the UN Guidelines on the Armed Private Security Companies.

The first important policy document- the IASC guidelines- originates in a 2001 discussion paper on the use of military or armed escorts for humanitarian convoys²²⁴. It was a non-binding document with a limited focus on convoy protection²²⁵, which stated that armed guards should be used only to protect humanitarian convoys and in cases of security vacuum.²²⁶

At the time of writing the IASC guidelines, resistance of humanitarians towards private security prevailed. Since the Somalia crisis, and then again in Afghanistan, a clash of cultures between humanitarian and the military-security professional reverberated within the humanitarian agencies, from the United Nations to the ICRC and MSF in particular.²²⁷

The militaristic security approach came to be criticized as having a negative impact on humanitarian practice and values. PMSCs seemed to contribute to a confusion of roles leading to a greater difficulty for humanitarians in being perceived as impartial.²²⁸ As Carmola wrote in her influential description of the organizational cultures of PMSCs: *they do not just span the*

²²⁴ On the drafting and negotiations of the document, cf. Østensen, pp. 45-46

²²⁵ As a general rule armed guards should not be used to protect humanitarian convoys, with no distinction made between national armed forces, international peacekeeping forces or private companies. The general exception to the rule concerns cases of last resort in security vacuums.

²²⁶ "The use of military or armed escorts for humanitarian convoys or operations is an extreme precautionary measure that should be taken only in exceptional circumstances and on a case-by-case basis. The decision to request or accept the use of military or armed escorts must be made by humanitarian organizations, not political or military authorities, based solely on humanitarian criteria." IASC Discussion Paper and Non-Binding Guidelines on the "Use of Military or Armed Escorts for Humanitarian Convoys" of September 2001. This paper was approved by the IASC and reviewed by the UN Office of Legal Affairs. Available online:

<https://docs.unocha.org/sites/dms/Documents/ENGLISH%20VERSION%20Guidelines%20for%20Complex%20Emergencies.pdf>

Accessed January 2, 2015

²²⁷ The ICRC and the Use of Armed Guards', Geneva, January 1997. Dan Byman, 'Uncertain Partners: NGOs and the Military', *Survival*, 43(2), 2001, p. 97; Thomas Weiss, *Military-Civilian Interactions: Intervention in Humanitarian Crises* (New York: Rowman and Littlefield, 1999); Chris Sieple, *The US Military/NGO Relationship in Humanitarian Interventions* (Carlisle, PA: US Army Peacekeeping Institute, 1996); George, 'The Politics of Peace'.

²²⁸ Weissman, Fabrice, ed. *In the shadow of 'just wars': violence, politics, and humanitarian action*. Cornell University Press, 2004.

*civilian-military divide, or the public-private divide: they combine aspects of three organizational cultures- military, business, and humanitarian- and shift among them as needed.*²²⁹

Thus, U.N. humanitarian agencies lived under conflicting imperatives that contributed to the difficulty of debating the topic. The result was a lingering general policy fragmentation, well described by Østensen: *the security of civilian personnel is formally the responsibility of the DSS, the humanitarian agencies most often also have separate arrangements for security. Some UN agencies rely primarily on their own in-house capacity for the security of their staff and operations.*²³⁰

The second document, the Field Security Handbook²³¹, was less restrictive than the IASC guidelines but attentive to the issue of liability.²³² No mention is made of rules for the use of force or other operating standards, or the range of services that can be procured. Opacity still prevented the discussions around PMSCs. The third document, UN Guidelines on the Armed Private Security Companies, or APSC Guidelines, was approved in 2012.²³³ It was released shortly after the Secretary-General, for the first time, presented a report to the General Assembly on the use of private security that re-asserted a precautionary principle.²³⁴

2.2 U.N. as Law-Maker

²²⁹ Carmola, Op. Cit, p.28

²³⁰ *At the same time they contribute to the DSS security function through a cost sharing system (altogether 45 per cent of total DSS expenditure) calculated on a per capita staffing basis. This means that the largest UN humanitarian agencies will contribute significantly to the centralized UN security system while relying mostly on their own internal security arrangements; this has reportedly caused some tensions between the DSS and the UN humanitarian agencies.*

²³¹ Department of Safety and Security, *Field Security Handbook*, Annex O (New York: DSS, 2006). It has now been replaced by the UN Security Management System: Policy Manual

²³² Østensen, Op. Cit, p.41

²³³ Krahmann (2014). She also stresses the need to broaden the scope beyond unarmed contractors; clarifying the conditions of use; revise the assessment system that justify a potentially excessive precautionary use of guards; set professional standards that do not only rely on ICoC, ICoCA and ISO; develop effective sanctions by specifying what is considered non-compliance or misconduct and how contract abuse will be penalized

²³⁴ U.N. A/67/539). By common agreement and policy, it is a tool for use only when other possibilities have been exhausted.

An area where the indirect potential for the U.N. to drive change in the use of PMSCs lies where the institution has the prerogative of creating international law. The U.N. has the unique ability to reach an effective definition and an agreeable issue-area, which is often the indispensable prerequisite in international negotiations.²³⁵ The possibility of creating a definition of PMSC was thwarted by the complexity of the previous deeply institutionalized definition of mercenary, which made it difficult to change. It is now important to articulate these two aspects in order to understand how norms influenced policy, in section c and then, how the Draft convention was generated.

2.2.1 Influence of the anti-mercenary norm: from an unworkable definition to a slow transition

The problem of mercenaries was first raised at the United Nations in 1961 in connection with the Katangese secession. The UN General Assembly, the Security Council and the Commission on Human Rights adopted repeated resolutions condemning the activities of mercenaries. In 1979, the General Assembly decided to undertake the framing of a binding international text against the recruitment, use, financing and training of mercenaries. The cumulative definition in the document resembles the existing definition in the Geneva Convention. However, as opposed to the Geneva Convention, the UN Convention made not only being a mercenary an offence, but also the recruitment, use, financing and training of mercenaries by sovereign governments.

²³⁵ Cf. Chap. 3

The table below shows how the UN definition of mercenaries is almost identical to that of the Geneva Conventions.²³⁶

TABLE 2
Definition of Mercenary. Geneva Convention, Art. 47 ²³⁷ and U.N. Convention
(a) specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities; (Omitted in UN version)
(c) motivated by a desire for private gain;
(d) neither a national of a party to the conflict;
(e) neither a member of the armed forces of a Party to the conflict;
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Why is this important? What is crucial is the denial of the normal protections accorded to combatants and prisoners of war that they had up to that point enjoyed under the Geneva Conventions²³⁸. The complexity of the original definition lies in states seeking to eliminate mercenary activity by using a roundabout method:

*rather than an outright ban on mercenary activity, governments embraced the notion that such activity could be eliminated if one created a humanitarian legal environment that was so antithetical to mercenaries that these individuals would be deterred from engaging in mercenary activity.*²³⁹

²³⁶ Even if the UN Convention omits the requirement that a mercenary does in fact take part in hostilities. The *motivation* to do so is sufficient to be defined as a mercenary.

²³⁷ Abbreviated versions. Art. 47 of the Geneva Conventions of 12 August 1949. Article 47 has two parts. The first states that "A mercenary shall not have the right to be a combatant or a prisoner of war." Available at: <https://www.icrc.org/ihl/WebART/470-750057>

²³⁸ Ibid.

²³⁹ Nossal, Kim Richard. "Global governance and national interests: regulating transnational security corporations in the post-Cold War era." *Melb. J. Int'l L.* 2 (2001): 459.

Thus, the UN Mercenary Convention embraces the same definitional strategy as the Geneva Conventions.

2.2.1 How the anti-mercenary norm is still influential

It is argued that norms can be subject to a degeneration that may lead to their gradual decline. The decline and disappearance of the norm on declaration of war is a case in point in the international system; a common example is the weakening in submarine warfare norms.²⁴⁰

Over the course of two decades, the anti-mercenary norm was reformulated and its application limited. The diffusion of the negative perception of *combat* activities led security firms to a reorientation from combat-oriented to combat avoiding.²⁴¹ The policy change entrepreneurs were both PMSCs and states.²⁴² PMSCs providing defensive services only, do not violate the norm and have become fully legitimate actors²⁴³. The critical actors like the US, the United Kingdom, and only later the United Nations, adopted a narrowed interpretation of the anti-mercenary norm.

However, the norm against mercenary use continues to have clout on international organizations. The negative reactions to the rise of PMSCs within the UN, demonstrate that the norm against mercenarism use is still alive. The UN the existence of norm found confirmation in Percy's interviews of peacekeeping directors that mention a "political liability" as a constraint to hiring.²⁴⁴

²⁴⁰ Introduction

²⁴¹ Percy, Op. Cit., 227

²⁴² Petersohn 2014 and Leander emphasize PMSC and their role of change agent or even of epistemic community; Fitzimmons claims norm change was championed by states

²⁴³ Petersohn, Ulrich. "Reframing the anti-mercenary norm: Private military and security companies and mercenarism." *International Journal: Canada's Journal of Global Policy Analysis* (2014)

²⁴⁴ Percy, Op. Cit., 224

The transition

The evolution of definitions and a decline of influence of the anti-mercenary norm is summarized in table below. The account starts with the creation of the position of the Special Rapporteur on the use of mercenaries, created in 1987. It remained in existence until the policy shift of 2005. The Special Rapporteur Ballesteros saw no difference between mercenaries of the type operating in Africa during decolonization, and PMSCs. The Secretary General, Kofi Annan, like Ballesteros, remained anchored to the same definition.²⁴⁵ He declared that *when he was Head of the Department of Peacekeeping Operations and when the UN needed skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, he ‘considered the possibility of engaging a private firm’, but did not do so because he felt the world was not ‘ready to privatise peace.’*

As Percy put it, *Ballesteros provides perhaps the sine qua non example of a regulator obsessed with the last war*²⁴⁶. However, Ballesteros eventually moderated his stance and started a slow ‘paradigm shift’. PMSCs are no more mercenaries but are configured as actors ‘conducting mercenary activities’ - a precursor of changes to come.

Then, the position of the Special Rapporteur was replaced by the Working Group (WG) on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination in July 2005.

The appointment of Shaista Shameem as a new Special Rapporteur can be identified as the crucial moment for the shift.²⁴⁷ She advocates for ‘a fundamental rethinking of the issue of mercenarism and its relation to the promotion and protection of human rights’ as well as ‘a

²⁴⁵ UN Press Release SG/SM/6613/Rev.1 26 June 1998 in Ghebali, Op. Cit, p.11, fn. 63.

²⁴⁶ Percy 2012

²⁴⁷ Krahmann, Op. Cit

fundamental reconsideration of (...) the responsibility of States and the United Nations with respect to the activities of actors currently legally defined as mercenaries²⁴⁸.

²⁴⁸ A/60/263 of 17 August 2005, § 45

Table 3: Evolution of definitions within the United Nations, 1989-2010

Organizational Body	Definition	Context
Initial UN position (Mercenary Convention) Signed 1989, in force 2001	5- points definition: (a) specially recruited locally or abroad in order to fight in an armed conflict; (b) motivated by a desire for private gain; (c) neither a national of a party to the conflict; (d) neither a member of the armed forces of a Party to the conflict; (e) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces	Historical context of post-colonial Africa inspires the definition
Special Rapporteur (Ballesteros), 1994	Unchanged	Executive Outcomes participates to the local conflict in Angola and are referred to as ‘mercenaries’ The UN discourse criminalizes the company, its employees and its activity.
Special Rapporteur, 1998	Unchanged but the term private security companies (PSCs) is introduced	Firms such as Executive Outcomes are ‘mercenaries’
Special Rapporteur, 2000	Unchanged. The Rapporteur moderates his critical stance; Construction of PSCs as legal entities with a ‘right to work in the area of security’	Not yet ready to accept that the UN Mercenary Convention had no relevance firms. To support his view, Ballesteros turned to Article 2 of the Convention, insisting that

		PSCs must not recruit, hire, finance or use mercenaries to fight in armed conflicts.
Special Rapporteur (Shaista Shameen), 2004	Unchanged.	Internal Conflict. Shameen recommends that the UN re-examine the relevance of the term mercenary; UN Commission on Human Rights replaced Shameen with a working group consisting of five experts
Working Group, 2005	Unchanged but shift of issue: 'government agreements that provide PMSCs and their employees with immunity for human rights violations' as one of its foremost concerns	
Working Group, 2010	New Definition: a PMSC is a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities	New Definition in the Draft Convention; Abandoned efforts to reinforce the Anti-mercenary Convention

Her reports point to the possibility of ‘a fundamental revamping or the total revocation of the UN 1989 Convention on mercenaries’ and also yield ‘a useful outcome for the United Nations itself with respect to effective maintenance of its peacekeeping and peace building mandates. In the absence of an adequate definition of mercenaries, she argues for a pragmatic approach as she engages fruitfully with industry and civil society.’²⁴⁹

The creation of a Working Group was indeed a key moment in the evolution of the United Nations policy on PMSCs (Cf. table 3). While it is noted that *the focus appears to remain largely on the implications of PMSCs on the state monopoly of violence, and somewhat less on human rights violations per se*²⁵⁰, the Working Group was gradually shifting the issue definition. The Working Group tirelessly worked to open an area of research with field-visits and reports. Krahmann writes that by:

*eliminating first the concept of mercenaries and second the notion of mercenary activities from its discourse and substituting them with PMSCs and inherently state functions, the Working Group not only undermined the application of the UN Mercenary Convention but also opened up the possibility of legalizing persons and companies selling armed force in conflicts for profit through ‘improved’ state regulation.*²⁵¹

In fact, the Working Group used the term ‘PMSCs’ from the start and by distinguished

²⁴⁹ Ghebali in Bryden and Caparini, Private Actors and Security Governance, 2006. At a meeting in London (June 2005), convened at her suggestion, with representatives of we strongly recommend that the UN reexamine the relevance of the term *mercenary*’ because ‘this derogatory term is completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.’ The communiqué also stressed that ‘the industry is keen to engage with UN mechanisms and is willing to examine a wide variety of options to ensure that the private sector continues to be an increasing and positive presence in peace and stability operations’ before announcing the convening of ‘a future industry conference to develop a unified international code of conduct related to private sector operations in conflict/ post conflict environments’

²⁵⁰ Østensen, p.59

²⁵¹ Krahmann 2011:362

explicitly between *mercenaries, mercenary-related activities and the activities of PMSCs its discourse suggested that PMSCs were not mercenaries, and nor were their activities 'mercenary'*.²⁵²

The labors of the Working Group culminated with the submission of the Draft Convention to the HRC in 2010²⁵³. Based on the proposal, the HRC established an open-ended intergovernmental working group (IGWG) to elaborate a legally binding instrument on the regulation, monitoring, and oversight of the impact of PMSCs' activities.²⁵⁴

2.2.3 Norm on the monopoly on violence

An alternative normative approach is now useful. It relies on the Weberian notion of the state monopoly on violence. This line of analysis is useful to see how changes in the anti-mercenary norm, so far described, and changes in the norm of the state monopoly on violence can be related:

The discursive reinterpretation of the core functions of the state and the military, and the differentiation between mercenaries who fight in 'combat' and PMSCs who engage in 'defensive operations' (...) help explain how the norm of the state monopoly on violence can change, while at the same time the norm against mercenarism has remained strong (Percy, 2007b in Krahmann).

²⁵² Krahmann 2011:359

²⁵³ Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Self-determination', UN Doc A/HRC/15/25 (2 July 2010).

²⁵⁴ Human Rights Council meeting, Press Release of 1 October 2010, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID1/410407&LangID1/4E>

How is this shift shown? First, Krahmann shows a variation in the interpretation of the state monopoly on violence through the narrowing of the functions considered to be ‘inherently governmental’:

*Until the mid-1990s the inherent functions of state agencies, including the armed forces, were defined in the USA as all tasks that ‘represent the exercise of sovereign power’ (...). During the next decade, the range of these functions was progressively cut down. Today, the governmental discourses in the USA, the UK and Germany argue that the state monopoly on violence refers to the control over the legitimate use of armed force, not its actual exercise.*²⁵⁵

Second, Krahmann study of the discourse in official statements or parliament debates shows that an acceptance of the distinction between offensive and defensive security. The result is that PMSCs do not fall under the definitions of the UN, AU and Geneva conventions. The shift in the monopoly on violence is thus the product of a government use of

an increasingly narrow definition of ‘direct participation in hostilities’ that pertains only to offensive action. Quarterly Reports on US contractors issued by the US Central Command emphasize that ‘private security contractor personnel are not authorized to participate in offensive operations’. (...) Other governments that hire armed security contractors have used a similar strategy.

²⁵⁵ Today, as opposed to the mid-nineties. Krahmann 2013:64-65

However, I have outlined here constructivist approaches that have one feature in common—i.e. a focus on changes in policy *discourse*. There is reluctance in political science to use discourse in the study of ideas. Discourse is perceived as a disadvantage since it conjures up *exaggerated visions of postmodernists and post-structuralists who are assumed to interpret “texts” without contexts and to understand reality as all words, whatever the deeds.*²⁵⁶ Nonetheless, and in absence of better data on an opaque topic, adding discourse to a study of ideas seems fruitful to many scholars.

2.3. Organizational contingencies

The development of practices and policies evolved with mission imperatives and accidents driving continuity or change. The policy development on PMSCs was marked by key events such as the bombing of the U.N. in Baghdad that drove the sense of insecurity and the demand for PMSCs; and the reform of the Human Rights bodies—where the Draft Convention was eventually developed. I shall start with the latter.

The Human Rights Commission is a human rights body that spearheaded research and field missions on PMSCs. After a polemic for its selectivity and politicization, the Commission was replaced with a new *Human Rights Council* (from now HRC). The proponents of the new body expected the HRC to be active in protecting and not only promoting human rights²⁵⁷. The agenda adopted in 2007 consists of ten items²⁵⁸; the issue of PMSCs is still not directly on the

²⁵⁶ Schmidt, Vivien A. "Discursive institutionalism: The explanatory power of ideas and discourse." *Annu. Rev. Polit. Sci.* 11 (2008): 303-326. She writes that *the term used to define this approach, discursive institutionalism, is of very recent vintage (see Schmidt 2002a, 2006a,b). Although others have used the same term (see Campbell & Pedersen 2001)—or similar ones, such as ideational institutionalism (Hay 2001), constructivist institutionalism (Hay 2006), or strategic constructivism (Jabko 2006).*

²⁵⁷ Ramcharan 2013

²⁵⁸ Ramcharan 2013: 37

agenda.²⁵⁹ Further, the reorganization happened amidst other continued challenges and humanitarian crises, and the problem of how to strengthen the Security Council. The High Level Panel on Threats, Challenges and Change addressed difficult issues such as the composition of the Human Rights Council and the Responsibility to Protect doctrine²⁶⁰ but PMSCs were not on the agenda either. Private force remained unregulated but called for in situations of rapid deterioration in security levels.²⁶¹

Another important organizational factor is that the war to Iraq sidelined the organization and generated a crisis of confidence amongst member states and staff.²⁶² Before the U.S.-led intervention in Iraq, the end of the Cold War had pointed to a new role for the United Nations²⁶³ but the renewed conflict led to disorientation. The Security Council was sidelined, and then a U.N. presence was imposed to “add tone”, in post-conflict Iraq.²⁶⁴ PMSCs “in effect substituted for U.N. peacekeepers by offering not only forces, but international forces”.²⁶⁵

Then, in 2003, the Canal Hotel Bombing in Baghdad led to the death of many staff including the U.N. Special Representative. The attack deepened an *already powerful sense of crisis in the organization’s senior staff*²⁶⁶. A direct consequence was the creation of a new Department of Safety

²⁵⁹ However, before the new body was set up, UN Commission on Human Rights could still replace the Special Rapporteur with a group consisting of five experts, the *UN Working Group on the Use of Mercenaries* in 2005. UN Commission of Human Rights, Resolution 2005/2, 7 April 2005.

²⁶⁰ Annan, Kofi A. 2004 *A More Secure World*

²⁶¹ Ostensen recalls the 2009 suicide attack on the WFP office in Islamabad Østensen : *UN Under Secretary General for Safety and Security Gregory Starr later admitted to increased use of private security companies in Pakistan in response to a series of attacks, killings and kidnappings targeting UN personnel. Apparently, however, the Pakistani government made it clear it would not approve the use of foreign PMSCs*

²⁶² Lowe, Vaughan, et al., eds. *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945: The Evolution of Thought and Practice since 1945*. Oxford University Press, 2008. pp. 402-3

²⁶³ Annan, Kofi A. 2004 *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*. UN Doc. A/59/565. United Nations Publications, 2004 Annan, Kofi A. 2004 *A More Secure World*. P. 13. The reports points to long-standing regional conflicts that remain unresolved, such as Israel/Palestine and Kashmir. Also “Failure to act in the face of ethnic cleansing and genocide in Rwanda and Bosnia eroded international support. Optimism yielded to renewed cynicism about the willingness of Member States to support the Organization” ¶ 13, page 13

²⁶⁴ Guéhenno, then head of Peacekeeping, cites this comment made by Prendergast. In Guéhenno, Jean-Marie. Op.Cit. Ch. 2

²⁶⁵ Avant 2006:510

²⁶⁶ Bosco 2009: 243

and Security, and the increased use of PMSCs.²⁶⁷ The position towards PMSCs however was uncoordinated and mostly marked by contingent choices.

2.4 The Draft Convention

2.4.1 Origins and Aims

The *Open-Ended Intergovernmental Working Group* took on the project of elaborating a Draft Convention from the *Working Group on the Use of Mercenaries*.

The aim of the Convention was to “reaffirm and strengthen State responsibility for the use of force”, particularly by “identify[ing] those functions which are inherently governmental and which cannot be outsourced.”²⁶⁸

The ‘Definitions’ section of the Draft Convention gives the foundation of the inherent state functions which are ‘consistent with the principle of State monopoly on the legitimate use of force’²⁶⁹, and cannot be outsourced or delegated to non-state actors. These functions include:

direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction

²⁶⁷ December 2004 of Resolution 59/276. Å. G. Østensen, 2013, at P.22.

²⁶⁸ Draft Convention, Art. 1(1); Available at: http://psm.du.edu/media/documents/international_regulation/united_nations/human_rights_council_and_ga/open_ended_wg/session_1/un_open_ended_wg_session_1_draft-of-a-possible-convention.pdf

²⁶⁹ Ibid., Art. 2(i)

*and police powers, especially the powers of arrest or detention including the interrogation of detainees*²⁷⁰.

Thus, the definitions of “inherent state functions” stem from the principle of state monopoly on the legitimate use of force, a principle that is itself contested. Although the state monopoly on the use of force has been an objective for most states, the chosen restrictive definition has no consensus in the international community. This aspect stands in stark contrasts with the Montreux Document, which only identified prohibitions on contracting states outsourcing activities that international humanitarian law assigns to states, such as exercising the power of the responsible officer over prisoners of war or internment camps.²⁷¹

2.4.2 The Draft Convention and Montreux

Aware that the Montreux Document was being generated simultaneously, one of the leaders of the Working Group distinguished the efforts of the two: while former *aimed to provide guidance for industry self-regulation, the Working Group, impressed as it was with the disturbing realities it had observed, was trying to add some legal teeth to their recommendations, and to forcefully make the business of PMSCs the responsibility of the states that provide them with a “home”*.²⁷²

Like the Montreux Document, the Draft Convention developed to address specifically the role of states in regulating PMSCs. However, one could identify at least three types of differences between the initiatives. First, the Draft Convention has a much wider spectrum of

²⁷⁰ Ibid, Art 2(i)

²⁷¹ White, p. 137.

²⁷² Nikitin, cited in *Carmola*, Op.Cit. p. 106

activities, as shown in table 4 below.

For example, the Montreux Document does not deal specifically with training, espionage, intelligence, or knowledge transfer²⁷³. Second, the proposed sphere of application of the Draft Convention is wider since it would hold both in times of peace and armed conflict and encompasses a large of issues of cooperation and conflict in world politics. Third, the Draft Convention proposes new tools and oversight mechanisms.²⁷⁴

²⁷³ Cockayne argued however that the document may extend to so-called 'black operations'. Cockayne, *Op. Cit.*, p.410. His view was probably aspirational

²⁷⁴ The Draft Convention describes an Oversight Committee to ensure oversight and monitoring, with three proposed methods of supervision and accountability (Committee on the Regulation, Oversight and Monitoring. *Ibid.* Art. 27; its proposed purposes and prerogatives are described in Art. 29.) and tasked with establishing an international register of PMSCs. Another innovation contained in the Draft Convention is the creation of national licensing regimes that would cover trafficking in firearms as well as the import and export of military and security services.

Table 4: Spectrum of services and identified prohibitions²⁷⁵	UN Convention	Montreux
Armed guarding, protection of persons & objects	Allowed	Allowed
Direct participation in hostilities	Prohibited	Not directly prohibited
Waging war and/or combat operations	Prohibited	Unclear
Taking prisoners	Prohibited	Prisoner detention allowed
Law-making	Prohibited	Unclear
Espionage	Prohibited	Unclear
Intelligence	Prohibited	Unclear
Use of and other activities related to weapons of mass destruction	Prohibited	Maintenance of weapons system allowed
Police powers, especially powers of arrest or detention including interrogation of detainees	Prohibited	Unclear

2.4.3 Prospects and Challenges for the Draft Convention

The Draft Convention confronted problems of legitimacy, capacity, and political commitment. First, arguments around the legitimacy of the drafting process- or of the institution that produced it- affected the prospects for a treaty. White writes that *just as the Montreux Document's legitimacy is undermined by the fact that it is promoted by those hosting and using PMSCs, so the Draft Convention is arguably tainted by its creator's history*²⁷⁶.

The drafting process of the Convention reproduced the same political biases that have been seen in systematic analysis of controversial votes in the HRC, where voting heavily clusters

²⁷⁵ Based on White, in Bakker and Sossai 2012

²⁷⁶ White, N. in Bakker and Sossai 2012, p.17

member states²⁷⁷. The voting of the resolution that had created the open-ended IGWG Convention had itself been very polarized.²⁷⁸ Moreover, a peculiar inconsistency lies within the United Nations' own practice which further undermines legitimacy, as I noted in section 2.1.2. In this sense, Østensen writes that *in dealing with the practice of hiring PMSCs in zones of conflict or humanitarian operations, the draft convention fails to address properly UN reliance upon PMSCs*²⁷⁹.

Second, the U.N. initiative assumes that states will have the capacity to implement such a convention²⁸⁰. In fact, it requires state parties to establish a comprehensive domestic regime of regulation and oversight.²⁸¹ However, enforcement and capacity are a major obstacle in territorial states.

Third, the lack of general political commitment was a hindrance. The international consensus that is required to achieve such a comprehensive treaty simply does not exist at this point. It similarly prevented a regional initiative to regulate PMSCs at the European level²⁸². Without the participation of key contracting states, such as the US and UK, chances are that the convention might become largely irrelevant.

²⁷⁷ Hug, Simon, and Richard Lukács. "Preferences or blocs? Voting in the United Nations human rights council." *The Review of International Organizations* 9.1 (2014): 83-106. They found that controversial votes initiated by Pakistan and Cuba, and to a lesser extent Egypt lead to quite distinct voting patterns where EU member countries play a central role, but also almost systematically lose.

²⁷⁸ By a majority of 32 in favor, twelve against, and 3 abstentions. In favour (32): Angola, Argentina, Bahrain, Bangladesh, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, Guatemala, Jordan, Kyrgyzstan, Libyan Arab Jamahiriya, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Uruguay and Zambia. Against (12): Belgium, France, Hungary, Japan, Poland, Republic of Korea, Republic of Moldova, Slovakia, Spain, Ukraine, United Kingdom, and United States. Abstentions (3): Maldives, Norway, and Switzerland.

See Human Rights Council establishes Working Group on activities of Private Security Companies, renews mandates on Sudan and Somalia, at 4, available at http://reliefweb.int/sites/reliefweb.int/files/resources/1D80786AA85ABF37852577AF00755F7E-Full_Report.pdf

²⁷⁹ *The document barely touches upon the fact that the organisation is itself a frequent PMSC customer and carries its own responsibility for contractor adherence to international humanitarian law and respect for human rights. This omission becomes particularly problematic as the convention also envisions a UN organ to investigate potential reports of human rights violations, and subsequently impose 'appropriate disciplinary and penal sanctions'.* (Østensen 2011)

²⁸⁰ Østensen, p. 60; Perret: *the Draft Convention requires that each state party establish jurisdiction over potential offenses when the offence is "committed within its territory", or "on board a vessel flying the flag of that [s]tate or an aircraft registered under the laws of that [s]tate at the time the offence is committed," or "the offence is committed against a national of that [s]tate," or "the offence is committed by a stateless person who has his or her habitual residence in the territory of that [s]tate."* These provisions do not contemplate that states may not be able to insure security or justice for its citizens or be able to implement the convention within its own jurisdiction.

²⁸¹ Strictly speaking the Montreux Document does not but it has encouraged a discussion around domestic reform (cf. next chapter)

²⁸² Perret writes that following the Priv-War Recommendations on EU Regulatory Action, *the European Parliament adopted a resolution in May 2011 in which it considered that "the adoption of EU regulatory measures, including a comprehensive normative system for the establishment, registration, licensing, monitoring and reporting violations of applicable law by private military and security (PMS) companies—both at internal and external level—, is necessary."* The Parliament invited the Commission and the member states to initiate the regulatory measures, however, to date no further actions have been taken. (Perret, forthcoming)

Conclusions

I traced the development of the Draft Convention and I distinguished between the operational practice of the United Nations and her ability to propose multilateral treaties. The process was delayed by the highly institutionalized anti-mercenary norm and the protean nature of PMSCs. Thus, the end result was a polarization with the GA opposed to all types of private force, and the Security Council almost never dealing with it.

The level of political commitment on PMSCs treaties depends upon the scope of the definition. The greater its scope, the greater the chances that strong states will have reservations. Especially in areas such as intelligence, the trade-off between privacy and anonymity, on the one hand, and surveillance on the other, is the result of technological changes that affect politics, policy and human understanding jointly and at an unprecedented scale. One could borrow an analogy from a related field, cyber-security, where a treaty has been simply an illusion: “The official response is yes, we want there to be rules of the road and to apply the law of armed conflict. But unofficially the answer is no countries that have advanced capabilities want to preserve that.”²⁸³

²⁸³ Singer and Friedman A., 2014. p.186

PART II

The Functioning of Regime Complexity

Chapter 3: TESTING PMSCs NORMS

As the regime literature has argued, reaching an agreement is a stage in the negotiation, not the end of the process.²⁸⁴ As Ralby wrote the Document does not resolve the issue of accountability for PMSCs, the Montreux Document provides a “valuable starting point for a process that will need to continue indefinitely”.²⁸⁵ Thus, it is important to investigate the process that *followed* the adoption of Montreux. One of the authors of the Document itself asked: “Now that states have a yardstick—imperfect as it may be—by which to measure their own and each others’ practice in dealing with PMSCs, will they be prepared to use it?” (Cockayne 2009: 427). This is the question I tackle next. This chapter tests if PMSCs norms succeeded in taking shape in the first five years after the signing of the Montreux Document.

3.1 Montreux + 5

3.1.1 Case Selection

²⁸⁴ Spector, and Zartman. Op. Cit.

²⁸⁵ Ralby, forthcoming

Case studies are often valuable for understanding key events that selected or blocked some possible future paths.²⁸⁶ This chapter seeks order by using an existing theory. I attempt a *disciplined interpretive case study* as I try applying a known theory- regime theory- to a new terrain²⁸⁷; I inquire if a regime is taking shape.

I select a venue and time from a very limited set of options. After a few regional consultations²⁸⁸, the conference *Montreux +5* was the first international forum since the signing of both the Montreux in 2008 and the release of the U.N. Draft Convention in 2010. Most importantly, both signatories and non-signatories states of the Montreux Document were present. The conference created an ideal litmus test to explore what followed the adoption of Montreux. Now that states have had a yardstick have they been prepared to use it?

In the following sections, process tracing and participant observation drive my inquiry. I draw from a variety of data collected during research work conducted in 2013 and 2014, including over dozens of interviews with politicians, security officials, delegates of international organizations and other informants, as well as available literature and archival sources. The narrative benefited from my participation as a contributor to the *Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices*²⁸⁹ - or the Shadow Report- an attempt of academics and activists to write a report, alternative to the

²⁸⁶ Odell, John S. "Case study methods in international political economy." *International Studies Perspectives* 2.2 (2001): 161-176.

²⁸⁷ Ibid. The more explicit and systematic the use of theoretical concepts, the more powerful the application. Although this method may not test a theory, the case study shows that one or more known theories can be extended to account for a new event.

²⁸⁸ In Asia and Latin America. The proceedings of the regional workshops held by DCAF are available at : <http://www.dcaf.ch/Programmes/Private-Security-Governance> , accessed September 2014

²⁸⁹ Rebecca DeWinter-Schmitt (Ed) *Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices*, available at <http://ihrib.org/wpcontent/uploads/2013/12/MontreuxFv3.pdf>

official one, with challenges and recommendations for addressing gaps in the effectiveness of the Document²⁹⁰.

By 2013, after five years from the endorsement, the Montreux Document endorsements increased to 49 States and three international organizations. The conference *Montreux +5* held in Switzerland, in December 11-13, 2013.

The conference presented data for assessing the implementation efforts of States. The official report relied on state responses to a survey using the following metrics: variation in the determination of services that can be outsourced; variation in the due diligence obligation regarding authorizing, selecting, contracting firms; and variation in states obligation ensuring accountability²⁹¹.

3.2 Attitudes and Expectations

The convergence of expectations around defined issue-areas has been shown to be one of the most important indicators of regime formation. Oren Young wrote a *conjunction of convergent*

²⁹⁰ The presentation of the results at the conference at American University Washington School of Law provided an initial arena to assess the opinions regarding the achievements of the Montreux Document.

²⁹¹ All participating States were asked to complete a questionnaire; it can be found at: http://www.cda.admin.ch/etc/medialib/downloads/event/event1.Par.0001.File.tmp/Montreux5_Questionnaire_2013.pdf, accessed on October 8, 2013.

*expectations and recognized patterns of behavior or practice*²⁹²; Krasner of *convergence of expectations in a given issue-area*²⁹³.

During the conference, states positions pronouncedly diverged. The so-called BRIC countries, Brazil and South Africa, were vocal in disparaging the Montreux process as a “forfeiture of State responsibility” to regulate the industry, and were supportive of the efforts of the UNWG to develop a binding international convention²⁹⁴.

A key signatory, South Africa, the country with the strongest laws in the books, was the most skeptical. On the eve of the “Montreux + 5” conference, Gumedze stresses how little relevance Montreux had for national policy. He writes: *the only document which links South Africa to the Montreux Document is the Department of International Relations and Cooperation (DIRCO) Strategic Plan 2010-2013 (Strategic Plan)*²⁹⁵.

A criticism of the Montreux Document is that does not address the responsibilities of States for PMSC personnel that are commonly referred to as Third Country Nationals.²⁹⁶ This is illustrated in the Shadow report and has been at the heart of South Africa’s shifting policy preferences. Thus, what appeared, especially to Swiss negotiators, to be a repeated pattern of

²⁹² Oran Young synthesizes the positive and negative conclusions (“political scientists tend to find evidence of the significance of regimes in addressing environmental problems. The quantitative case studies, arguably reflecting skeptical attitudes to governance systems common among economists, typically raise doubts about the roles that regimes play”). He adds that the large *N* studies have sought to move beyond this divide but the three works he cites carry mistakes in the titles that are misleading insofar as they tend to over-emphasize success beyond the environmental sphere

²⁹³ Krasner, *International Regimes*, 1983 p.1. Also Puchala and Hopkins write that “a regime is an attitudinal phenomenon. Behavior follows from adherence to principles, norms, and rules, which legal codes sometimes reflect. But regimes themselves are subjective: they exist primarily as participants’ understandings, expectations or convictions”.

²⁹⁴ Interviews, January 2014

²⁹⁵ Prom S. Gumedze (2013) in the Shadow Report to Montreux Document (forthcoming). *The document states that DIRCO will, among other things “consider, supporting and participating in the Swiss Government’s initiative to disseminate the Montreux Document on Private Military and security Companies.”*

²⁹⁶ *The States of origin* (of Third Country Nationals) *may not fall under the current categories of Contracting, Territorial, or Home States. For example, in Chile’s situation, some of its citizens were contracted by U.S. companies through non-U.S. based hiring firms under contracts that referenced neither Chilean nor U.S. law. The Montreux Document’s State categories do not directly address this situation.* Perret in DeWinter-Schmitt, p. 38

strategic behavior, was an attempt to make domestic laws known and respected in international documents²⁹⁷.

The conference “Montreux + 5” failed to project a sense of shared perceptions and beliefs. A reluctance to identify the problem of Third Country Nationals, or to agree on items like the international blacklist for PMSCs, for example, undermined trust from some states.²⁹⁸ The conference fostered the perception that contracting states were trying to shield their industry even on the most basic proposals²⁹⁹. The study is also hampered by the fact that only limited data was provided by the states that responded to the official questionnaire.

Haas wrote that cluster of issues that appear on the agenda of negotiators may come to be suddenly “resolve(d) by tentatively recognizing an issue-area”³⁰⁰. This did not quite happen with “Montreux+5”. At the same time, this conclusion should perhaps be tempered. As Avant recalls:

*A lot of country representatives from non-signatory states were attending and they were curious as to what regulation they should have. (...) it is rarely the case that people in the government sit down and discuss how to regulate PMSC. Usually they are patching together regulation in response to something that has happened. They are deciding to regulate or to even address this issue because a problem has arisen and are responding in a variety of ways; making use of what laws are already existing and/or maybe consulting international best practices.*³⁰¹

²⁹⁷ Cf. Chapter on South Africa below

²⁹⁸ Interviews, Geneva, July 2014

²⁹⁹ Interviews, South African ambassador, July 2014

³⁰⁰ Haas, Ernst B. "Why collaborate? Issue-linkage and international regimes." *World Politics* 32.03 (1980): 357-405.

³⁰¹ Avant D., Commentary, <http://iisonline.net/interview-with-prof-deborah-avant-carried-out-in-denver-on-january-24-2014/>, accessed September 2014

3.3 Implementation of Reforms

The patterns of implementation that I summarize in table 5 are an indication that some reform has taken place. The efforts to advance on the determination of services have had mixed success. On the one hand, there were improvements in domestic accountability policies. Of the two cited successes of the Montreux Document, one is that it helped make states' obligations with respect to PMSC activities in armed conflict be better understood³⁰²; thus providing a basis to draft better regulations. The second, and most important point, is that it informed US policy reform³⁰³. Improvements in due diligence and criminal accountability were noted.³⁰⁴ Data gathered in the Shadow report showed an increase in suspension and debarments for companies that do not uphold standards.

³⁰² Chairs' conclusions, available at: <http://www.eda.admin.ch/Montreux+5>

³⁰³ Avant 2013

³⁰⁴ E.g. The introduction of a Serious Incident Report for abuses; a Federal Contractors database.

TABLE 5. MONTREUX DOCUMENT, IMPLEMENTATION, 2008-2013³⁰⁵

Determination of services ³⁰⁶ Low/Medium	In most states, imprecise determination of functions that PMSCs may or may not perform Inadequate extraterritorial applicability of legislation for PMSCs operating abroad ³⁰⁷ Country cases: USA: high but contradictory ³⁰⁸ ; UK: low; Afghanistan: high ³⁰⁹
Accountability ³¹⁰ Low/Medium	Weak monitoring of compliance with terms of authorizations, contracts and licenses Gaps in legal accountability and judicial liability; gaps remain in this area, whether they relate to corporate, criminal or civil law ³¹¹
Procedures of authorization ³¹² Low	Problem of Capacity ³¹³ Low standards as a basis for authorizations, contracts and licenses ³¹⁴

On the other, there remains a gaping need for efficient reporting mechanisms, legal requirements on background checks into the past conduct of PMSCs, adequate training, lawful acquisition of weapons and equipment. Legal gaps prevent victims of PMSC misconduct from

³⁰⁵ This table is offered for illustrative purposes and is based on a synthesis of both the Official Report and Shadow Report. It is not meant to be exhaustive nor to give an ordering of importance of the issues. It is based on Buckland and Burdzy, 2013, Progress and Opportunities: Five Years On, DCAF Report, and on Rebecca DeWinter-Schmitt (ed.) Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices, (2013)

³⁰⁶ Good Practices 1, 24 and 53 of the Montreux Document relate to which services may or may not be contracted out to PMSCs.

³⁰⁷ Buckland and Burdzy, P. 6. The report contrast a permissive approach (Finland or Angola) vs. Proscriptive approach (USA or UK in the area of export of services and goods in CBN)

³⁰⁸ Both DeWinter-Schmitt and Buckland and Burdzy agree on this. Cf. Buckland and Burdzy pp. 18-19 and DeWinter-Schmitt, pp. 41-42

³⁰⁹ From Shadow Report. In Afghanistan, the definition is “activities which provide security of real and natural persons, logistics, transportation, goods and equipment, training of security employees [and] warning services.”¹³⁸ Regulations have further classified security services into five different categories:¹³⁹ a) area security,¹⁴⁰ b) convoy security,¹⁴¹ c) fixed-site security,¹⁴² d) mobile security,¹⁴³ and e) police training missions

³¹⁰ Good Practices 5-13, 14-18, 30-42, and 60-67 cover several reporting mechanisms and requirements and include background checks into the past conduct of PMSCs, adequate training, lawful acquisition of weapons and equipment, and internal accountability policies

³¹¹ These gaps prevent victims of PMSC misconduct from seeking or obtaining justice. International legal remedies depend on the expediency and willingness of national prosecutors to bring cases before a criminal court. Buckland and Burdzy, 2013, P. 7

³¹² Procedures of authorization are outlined in Good Practices 2-4, 25-29, and 54-59. They include: designating a central, publically accountable authority, allocating adequate resources to the licensing authority and ensuring personnel are sufficiently trained to meet the task of issuing licenses.

³¹³ Montreux Document-endorsing states have identified a government organ with responsibility for the authorization, contracting and licensing of PMSCs but capacity required to adequately carry out their functions, Buckland and Burdzy, P. 30.

³¹⁴ Low standards in obtaining contracts, authorizations or licenses. (past conduct, personnel training, and internal company policies are being ignored or treated as less important than competitive pricing), Ibid, p 29.

seeking or obtaining justice. International legal remedies depend on the expediency and willingness of national prosecutors to bring cases before a criminal court. Another related important gap is the inability of the ICC to exercise jurisdiction over PMSCs³¹⁵.

Further, the failure of institutionalization of a regular dialogue among Montreux Document participants prevents norm diffusion. Buckland and Burdzy write:

*Regularising the dialogue between endorsing states would facilitate the sharing of lessons learned and good practice. It would also give the Montreux Document a clear voice and identity in relation to complementary pillars of the evolving international landscape of PMSC regulation, notably the new Association for the International Code of Conduct for Private Security Service Providers and the important work within the framework of the United Nations to develop international regulation in this area*³¹⁶.

In December 2014, in response to this criticism in particular, the Montreux Document participants during a ‘Constitutional Meeting’ created the *Montreux Forum*.³¹⁷ The Forum is going to offer a yearly plenary that brings together all the signatories; it opens the way to the standardizing the interchange between endorsing states and regularizing the role of the state in voluntary regulation, which will be illustrated in the next chapter.³¹⁸

³¹⁵ Perrin, Benjamin. "Mind the Gap: Lacunae in the International Legal Framework Governing Private Military and Security Companies." *Criminal Justice Ethics* 31.3 (2012): 213-232. He identifies three types of violations: 1) International crimes (specifically, genocide, crimes against humanity, and war crimes); 2) International human rights violations (e.g., preventing the right to peaceful assembly, arbitrary detention, and degrading treatment); 3) Ordinary crimes (e.g., murder, sexual assault, theft, and dangerous use of a firearm).

³¹⁶ Buckland and Burdzy, *Challenges and Opportunities*, p.51

³¹⁷ Author's Interview, February 2015. The first such event took place on 16th December 2014. A website was launched this year: <http://mdforum.ch/>. Accessed November 2015.

³¹⁸ At the time of submitting this dissertation a second edition of the DCAF Report *Challenges and Opportunities* relates on the Forum.

Conclusion

The conclusion from the analysis is that attitudes towards PMSCs norms remain at the stage of a developing practice. Borrowing Finnemore and Sikkink's three categories for norm diffusion, PMSCs norms would still be in the first stage of emergence- the second one being the *norm cascade* which occurs when at which at least one-third of the states share the same assessment on the emerging norm.³¹⁹ Entire regions have neither signed up to Montreux, nor shown interest in the U.N. initiative, nor started a process of domestic reform, thus making the universality of PMSCs norms aspirational. Several countries were still not present at *Montreux +5*, such as for example Central Asia countries. Russia and Kazakhstan, and to a lesser degree, Kyrgyzstan- have dynamic private security markets, and these states have bodies of legislation that regulate the activities of PSCs³²⁰. The same applies to large parts of Latin America and Africa.

Besides, a shortage of regularized dialogue among signatories prevented the diffusion of PMSCs norms within Montreux signatories in the first five years. This fits with the branch of regime theory that stresses how reaching an agreement is a stage in the negotiation, not the end of the process.³²¹ What lacked was a process of reiteration and re-negotiation, a point

³¹⁹ The third stage happens when norms are internalized. Finnemore and Sikkink, Op. Cit.. See Appendix A for a list of states that endorsed the Montreux Document

³²⁰ Proceedings of the Regional Workshop for North East and Central Asia on the Montreux Document, Available at psm.du.edu, Accessed December 10th 2014. All three states have indicated an interest in sending their troops and private guards to participate in international peacekeeping campaigns. Similarly, Mongolia had still not signed the Document in spite of having hosted a regional workshop in 2011 (Proceedings of the Regional Workshop for North East and Central Asia on the Montreux Document, Available at psm.du.edu, Accessed December 10th 2014). The workshop was convened by the Swiss Federal Department of Foreign Affairs, the Office of the President of Mongolia and the Mongolian Ministry of Foreign Affairs and Trade. It stated that Mongolia was examining whether to support the Montreux Document)

³²¹ Spector and Zartman. Op.Cit.

raised by those who have seen the Montreux Document as a work in progress and partly solved by the establishment of the Montreux Document Forum.

Chapter 4

Designing institutions: the role of the State in voluntary regulation

The previous chapter claimed that at the inter-state level, regime formation also depends upon a regular dialogue among Montreux Document participants. At the state-level, a greater commitment to reform is required. In particular, this chapter, starts with explaining and reviewing what is the role the state in voluntary regulations- i.e. the enforcement mechanism embedded in the procurement policy of leading states. I analyze how the strength of institutional change depends upon the increased and continued commitment of states. I problematize the proposed institutional change by using the IR concept of *forum shopping* and contend that there is a relationship between the increased costs of shifting forum and strong states commitment to strict compliance.

4.1 Potential of Voluntary Regulation

The roots of the ICoC are found in the negotiation of the Swiss initiative and the Montreux Document.³²² The body tasked with the promotion and enforcement of the code is the ICoC

³²² Cf. Chapter 1.

Association, which is composed of a General Assembly of all member companies, civil society organizations, a board of directors and a secretariat.³²³ The association has a three-pillared structure, with representatives from governments, the private security services industry, and civil society.³²⁴

In the past, PMSCs have adopted corporate codes of conduct, or participated in voluntary industry associations promoting such self-regulation but the ICoC has the potential to be a stronger mechanism for control of industry behavior than the previous codes.³²⁵ I shall now explain why.

4.1.1 Three innovations

Scholars have noted three positive aspects of the ICoC: its high human rights content, the prominent role of states, and the participatory nature of the multi-stakeholder process. Thus, the ICoC could be substantially better than older trade association codes.

First and foremost, is that states are invested in the process and create a higher-level enforcement mechanism. A literature associated with the problem of the ‘shadow of hierarchy’ sees the threat of state intervention as a key influence on the willingness of private groups to

³²³ International Code of Conduct for Private Security Providers’ Association (ICoCA) is a multi-stakeholder initiative established as a Swiss non-profit association. <http://www.icoca.ch/en/icoc-association>

³²⁴ The member governments must have also endorsed the Montreux Document to be affiliated with the Association of the ICoC. *Ibid.*, Art. 3.3.2.

³²⁵ The private security industry codes in the United States and in the United Kingdom, For a detailed analysis of the codes of the IPOA and the BAPSC, which are well-positioned to influence to develop international standards, cf. De Nevers (2010). The Voluntary Principles on Security and Human Rights are an example of the former. They were established in December 2000, were developed through consultation between the governments of the United Kingdom, the United States, Norway, and the Netherlands. While they were created by the extractive industries and human rights NGOs, the VPs excluded PMSCs but mean to exert direct influence on both public and private security providers

develop *effective* self-regulatory mechanisms; the state-failure and state building literature similarly agree that outcomes depend on the strength of institutions.

These arguments apply in this case because threat of state intervention is indispensable to make private security firms comply with higher standards. States could require companies to sign the ICoC and be member of the association in order to work for them, in their territory, or from their territory. The result would be the gradual imposition of human rights norms on PMSCs.

Some states have begun to require ICoCA membership for government contracts. For instance, the United States and Switzerland have announced they would include the code in their contracts.³²⁶ It hoped that other states would follow. In time, if states, in their domestic law, require membership in the association, a company that violates the code would see its capacity to have new contracts seriously compromised. This could be an effective sanction for violations of human rights by companies.

The greater role for states in indirectly supporting and strengthening the role of multi-stakeholder organizations means that the ICoCA is better placed to serve as an effective overseer.

The second innovation is that the content reflects higher human rights component in spite of the difficult conciliation between the demand of the PMSCs and the need to include both IHRL and IHL norms.³²⁷ The companies impacted the content even further, in that the ICoC

³²⁶ Available at <http://www.cjpd.admin.ch/cjpd/fr/home/aktuell/news/2015/2015-06-240.html>

³²⁷ N. Rosemann, *Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies*, Occasional Paper No 15, Geneva Center For the Democratic Control of Armed Forces (2008) at 9.

is more focused on IHRL than IHL. This outcome—no norms regulating combat activities but numerous standards for police services, for example—was a function of the common scope of the companies' business³²⁸. It was in line with the argument that PMSCs' use of force was not combat, but rather individual self-defense.³²⁹

The Code devotes considerable attention to violations of human rights, such as the prohibition of torture and cruel, inhuman, and degrading treatment. Similarly, the Code prohibits their personnel from engaging in sexual exploitation and abuse, gender-based violence, human trafficking, slavery, forced labor, child labor, and discrimination. As noted by Dickinson, this is significant because the treaties from which these principles are derived are often ambiguous about their applicability to nongovernmental actors.³³⁰

The third innovation of the ICoC, as described by Dickinson and Perret, was the broad base of participation in its creation.³³¹ Yet, in spite of extensive broad-based input, participation could have been more inclusive. The governments represented on the steering committee for the oversight mechanism consisted entirely of Western, developed countries. Dickinson writes:

A meeting in Africa, the Middle East, Asia, or South America would likely have added a different mix of voices and perspectives. In addition, private clients of security firms—often large,

³²⁸ A. Clapham, quoted in S. Bussard, 'La Suisse s'entend avec l'industrie pour réglementer l'action des mercenaires privés', *Le temps* (2010), Cited in Perret (2014)

³²⁹ For an interesting perspective on this evolution, cf. Petersohn, Ulrich. "Reframing the anti-mercenary norm: Private military and security companies and mercenarism." *International Journal: Canada's Journal of Global Policy Analysis* (2014): 0020702014544915.

³³⁰ Dickinson, L. A. (2013). Regulating the privatized security industry: the promise of public/private governance. *Emory Law Journal*, 63(2), pp. 421-423

³³¹ *Actors from states, civil society, and business participated in the negotiation of the content of the code. The Geneva Centre for the Democratic Control of Armed Forces (DCAF), the Swiss Federal Department of Foreign Affairs, and the Academy of International Humanitarian Law and Human Rights (ADH) in Geneva supported the entire process. Note that the ICRC, which supports the Montreux Document, did not support the International Code of Conduct. However, a legal adviser of the ICRC participates in the negotiation of the content of the code in a personal basis.*

*multinational corporations such as those in the extractive industries—were mostly absent from the process (..) although at least one meeting apparently included such corporations.*³³²

Only few NGOs are part of the process³³³. Leading host countries, such as Iraq, were notably absent, as were countries from the developing world more generally. Further, conspicuous is the absence from the process of another group of stakeholders - the employees of security firms.³³⁴

4.2 The Challenges in Implementation

However, despite the promise of the Code, problems remain with it. First, the monitoring system has only materialized at the time of writing.³³⁵ Five years after the Code was signed, the agreed upon method of holding companies accountable for non-compliance - e.g. exclusion or suspension of non-compliant actors- is only on paper.

Effective control may remain problematic wherever state procurement policy is not required, like in the context of maritime security. At the time of its drafting, legal opinions differed on whether the Montreux Document was suitable in the context of counter-piracy operations. Some argued that Somali piracy is not “armed conflict” under international law, and thus not

³³² Dickinson, L. A. (2013), Ibid.

³³³ Only Human Rights Watch and Human Rights First. On the trade off between transparency and independence, cf. Dickison. “Civil society groups wishing to participate will need to demonstrate that they have a strong record of promoting international human rights or humanitarian law and that they operate independent from both government and industry. This provision helps ensure that the civil society groups involved are true watchdogs and not mere fronts for government or industry masquerading as NGOs”. Dickinson, p. 449

³³⁴ I thank Bill Douglas at SAIS that helped me see this point. On the issue of Trade Unions and security personnel mobilization, cf.

McCallum, Jamie K. *Global unions, local power: the new spirit of transnational labor organizing*, Cornell University Press, 2013

³³⁵ Author’s interview with A. Orsmond, Executive Director of ICoCA, October 2015

subject to the IHL obligations endorsed by the Montreux Document.³³⁶ The ICoC proposed “individuals in a PSC may be bound by international criminal law, including *inter alia* (...) piracy”.³³⁷

A second issue is the congruence with existing initiatives. An outstanding question revolved around the extractive industries that were involved late in the process. De Winter-Schmitt and Elms describe the trade-off between the Voluntary Principles and the Code: *the extractive industries have expressed limited interest, in part because the (regulatory) mechanisms are far more onerous than the requirements laid out in the VPs.*³³⁸

A third and final problem is that the ICoCA lacks capacity. A slim budget and a staff of five support the secretariat of the ICoCA although it receives research and operational support from other organizations: the Swiss Government and the Centre for the Democratic Control of Armed Forces (DCAF).³³⁹

Max Weber famously saw the bureaucracy’s capacity to follow rules and orders as depending on a variety of mechanisms, one of which being resources. He wrote that “bureaucracy as a permanent structure is knit to the one presupposition of the availability of continuous revenues to maintain it” and that “the bureaucratic structure goes hand in hand with the concentration of the material means of management in the hands of the master”.³⁴⁰

³³⁶ However, as Coito writes, *the expansion of piracy since 2008, combined with the explicit invocation of IHL by Security Council Resolution 1851, suggest that piracy may increasingly be viewed as "armed conflict" in the future* Coito, Joel Christopher. "Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden." *Cal. L. Rev.* 101 (2013): 173.

³³⁷ Geneva Academy Briefing, No. 4, The International Code of Conduct for Private Security Service Providers, P.22 http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf, Accessed May 18, 2015

³³⁸ A Critical Analysis of the proliferation, dynamic interaction and evolution of self-regulation within the private security industry, Unpublished manuscript, p.34

³³⁹ http://www.icoc-psp.org/uploads/ICOCA_Draft_Financing_Model.pdf accessed March 3rd 2015. The latest available budget of the ICoCA reflects the same trends, cf. http://www.icoca.ch/sites/default/files/resources/ICOCA_Budget%202014.pdf, accessed April 8, 2015

³⁴⁰ Weber 1978: 980

The effectiveness of organizations, like a state's bureaucracy's capacity to influence and overcome resistance, depends upon resources and status. It is claimed that once procedures are in place funding is going to increase to support operational activities³⁴¹ but the ICoCA may be, at present, under-resourced at the very moment when a project of routinization of PMSCs norms and oversight needs to be supported strongly by an independent bureaucracy.

4.3 State Behavior

There are two alternative approaches to how states may react to the rise of external international monitoring³⁴². One possibility is that each may bargain *within* existing institutional framework. Another possibility is that states exploit the choice of law or forum to achieve their goals³⁴³ - the so-called forum shopping. The higher the cost of forum shopping, the greater is the exogenous, independent influence of proposed institutional changes. Are there, then, factors in the design of the institutional innovations that alter present and future costs of forum shopping³⁴⁴?

Variation in Costs of Forum Shopping

The ability of the great powers to shift forum, Drezner argued, raised the costs on *future* forum-shifting strategies.³⁴⁵ The fact that the first International Code has even been created increases

³⁴¹ Email Correspondence, Swiss diplomat, May 2015

³⁴² Snyder and Cooley 2015.

³⁴³ It is generally defined as the inclination and the ability of states to either act unilaterally or shift fora to friendlier organizations. Drezner 2008, Krasner 1985, 1991

³⁴⁴ Drezner, 2006.

³⁴⁵ Drezner 2006

de facto the forum shopping costs of switching to an alternative structure. States' incentives to shift forum would incur the opportunity cost associated with substituting across governance structures- i.e. to articulate a new policy *given* an already existing one.

Not surprisingly, costs are not the same for all states. The costs would be proportional to the level of engagement with the Montreux system and rules- i.e. the higher their engagement, the higher the cost. The United States, with Switzerland, would incur high symbolic and political costs,³⁴⁶ perhaps the highest of all states. It would be less costly for China, for example, than the United States to shift to another regime.³⁴⁷ The latter, also known as Working Group on the International Code of Conduct Association (ICoCA), performs the functions of the Advisory Forum of the Montreux Document Participants.³⁴⁸

Further, the panoply of initiatives of self-regulation contributes to regime complexity and to opportunities of forum shopping for states and firms- to which I turn to below.

³⁴⁶ Including the cost of “ceding the field to South Africa and to the proponent of a treaty”. Interview with U.S. government official, April 2015

³⁴⁷ China is a signatory of Montreux and a participant to the Montreux Document Forum, but not of the advisory forum the latter is the bridge between Montreux and the ICoCA. Yet, China has constantly shown a desire to comply to the highest standard. Author's interview, US government representative, April 2015

³⁴⁸ Working Practices of the Montreux Document Forum, par. 12

Box: the ISO standards

When the US government initiated a system of national audit and certification for PMSCs in response to the reform process generated by the Montreux Document and ICoC, the aim was to “make human rights auditable” and to operationalize the principles of the ICoC into a certifiable management system standard³⁴⁹.

With funding from the U.S. Department of Defense, the ASIS Commission on Standards- affiliated with the American national standards body (ANSI)- created an international management standard called ANSI/ASIS PSC1 Management System for Quality of Private Security Operations. According to Carmola, “the PSC1 is a remarkable document in that it speaks in a language of industry standards, but embeds the principles of human rights and humanitarian law into policies and procedures that are ‘auditable’.”³⁵⁰

Then, the standards were submitted to the International Organization for Standardization (ISO).³⁵¹ The ISO is a nongovernmental organization with a long history of setting international standards; the ISO 9001 quality management system standard is one of the best known. The ISO created a new Project Committee and appointed the same leadership that headed the ASIS International Initiative.³⁵²

³⁴⁹ For an overview, cf. http://psm.du.edu/international_regulation/global_standards_codes_of_conduct/asis_standard.html , Accessed February 2015

³⁵⁰ Carmola, 2014, p.756

³⁵¹ Many of these standards are management system standards, the ISO 9001 quality management system standard probably being the best known. For a general overview, cf. Murphy, Craig N., and JoAnne Yates. *The International Organization for Standardization (ISO): global governance through voluntary consensus*. Routledge, 2009.

³⁵² According to the authors, the ISO DIS 18788 guidelines are: broader than PSC1 (which is only for PSC); ISO is also for extractive firms that have their own internal security, Longer than any other ISO standard; Based on risk management principles (adapted from iso 31000: 2009).

Proliferation of standards

At present, several standards create a confusing web of overlaps often mentioned as the best illustration of “keeping options open for states”.³⁵³ Until the ISO standards becomes the unique golden rule, dynamics of cooperation and competition are going to linger. Even in the US, the single largest market, applicable standards are currently competing.³⁵⁴

The rivalry between competing standards presently increases regime complexity and spurs a global governance of duplication and overlap, potentially undermining the entire system of self-regulation. Dezalay and Garth have provided an account of the creation of a specific organizational field- i.e. a history of transnational arbitration.³⁵⁵ The conflictual evolution of PMSC governance could be comparable as long as it retains a gravitational center but institutional proliferation could also compromise the entire development of the Swiss initiative.

The established academic approaches in cases of competition between alternative standards have either relied on Gerschenkron’s perspective that timing is a key variable³⁵⁶ or on

³⁵³ Author’s Interviews, frm. State Dept. official, New York City, December 2014

³⁵⁴ In fact, *it will default to ASIS to decide if the ISO standard surpasses PSC.1, in which case ASIS can withdraw PSC.1 or let it sunset at its review period*, writes Rebecca DeWinter-Schmitt <http://psm.du.edu/commentary/>, Accessed February 2015

³⁵⁵ Dezalay and Garth, Op. Cit. Their history stresses the delicate transition from personal charismatic to routinized and specialized expertise negotiated by the International Chamber of Commerce

³⁵⁶ Countries that industrialized first, would be the first to develop product standards (Gerschenkron 1962). Thus, in the early industrialized countries, there was no need for governments to step in and spur a standardization system.

institutionalist approaches focused on events (“critical junctures”) that led to state-led product standardization.³⁵⁷

The most recent literature on adaptation and change in standardization stresses the strong mediating impact of existing institutional configuration on the speed and direction of change³⁵⁸. This literature focuses on product standards, however, and can be relevant only if we assume, *ceteris paribus*, that security can be compared to other goods³⁵⁹, then competition between rival standards is ultimately going to depend upon existing *implementing* institutions.³⁶⁰

Table 6: Future of Standards		
Mechanisms of Institutionalization	Market-based (ISO Standards)	State-based (Montreux Document Forum)
Land	PSC1 then ISO standard (18788) ³⁶¹	ICoCA Working Group
Sea	ISO PAS 28007:2012	ICoCA Maritime Working Group

³⁵⁷ The case of Germany during World War I is an example of an unexpectedly long war necessitating rationalization of supply. The American Civil War generated a similar development but left no lasting institutional legacy (Heilbroner and Singer 1994:140 in Witte). In contrast with the German and American experience, Witte argues that one of the important and influential global standards-setter, Japan, can be characterized as government-led. It started with the establishment of procurement standards by the navy and the army, and became then coordinated by the MITI.

³⁵⁸ Witte, Jan Martin. Dissertation. (2007) *National Varieties of Standardization: A Comparative Study of Emergence, Development and Change in National Standardization Systems*. Witte argues that the outcomes of change are not pre-determined.

³⁵⁹ For a conceptualization of security as a public or private good, cf. Engerer, Hella. "Security as a public, private or club good: some fundamental considerations." *Defence and Peace Economics* 22.2 (2011): 135-145.

³⁶⁰ There is an obvious imbalance between developed and developing countries in the participation to the creation of ISO standards

³⁶¹ It should happen by mid-2015

Conclusion

Several states have committed to standards that hold some promise. Non-state actors have historically found access to law making processes and there is a long history of private rule making.³⁶²

The proposed institutional changes do not challenge the broader existing political and social order³⁶³ and “rogue PMSCs” that choose to remain outside regulatory frameworks can still violate standards. The same holds true for rogue states that didn’t participate to the Swiss initiative. Yet, the Code is perhaps the best form of institutional innovation as it contemplates a greater role for states through procurement policy even if what it can achieve depends upon the continued commitment of states. The higher costs of forum shopping may not enough for strong states who do not want to comply. The effectiveness of voluntary regulation relies first and foremost on the feedbacks between institutions and states interests.

³⁶² Boyle, Alan, and Christine Chinkin. *The making of international law*. Oxford University Press, 2007, chap. 2. Several historical examples are considered, from the mediaeval political structures to commercial enterprises like the East India Company; social movements that campaigned for the abolition of slavery or workers right; the people’s movements that have brought down governments.

NGOs are singled out because they alone are given international legal status by the UN Charter. P.45. Walter Mattli and Tim Buthe, “Setting International Standards: Technological Rationality or Primacy of Power?” *World Politics* 56 (2003)

³⁶³ One of the best contributions on this remains Abrahamsen and Williams, Op. Cit. Also, Leander has written that *Codes de-politicize by distraction* and produced a web of second-order regulation, i.e. of regulation dealing with the rules for setting rules (Leander, Anna. "What do codes of conduct do? Hybrid constitutionalization and militarization in military markets." *Global Constitutionalism* 1.01 (2012): 91-119.)

PART III Boundaries of Regime

PREAMBLE

Regulatory cooperation in Africa

In the preceding chapters, I argued that variation in regulatory change in global politics is a process largely shaped by interests. I now move to explain variation at African state and inter-state level.

The dynamic is made more complex because the state interests lead to strategies of contestation and extraversion and also because choices and preferences are based on distinct normative foundations. While holding a monopoly of legitimate violence is one of the hallmarks of the modern legal- bureaucratic state, as Max Weber considered, the norm on the monopoly of violence in African political systems does not have the same meaning. In contrast to the norms emphasized in Part I, notably neutral humanitarianism, a driver of the Swiss initiative- two set of norms matter to the discussion in Part III: democracy and human rights can provide long-term prospects for PMSCs norms and are at times in tension with the anti-mercenary norm.

In this preamble, thus, more assumptions are required on the linkages between IR literature and African studies, on the theoretical expectations on norms' influence in Africa and on the work of PMSCs in Africa.

Table C: Regulatory Cooperation in Africa

Framework	Case-study, level of engagement (chapter)
1. Montreux Document	South Africa: mixed, with contestation (chapter 5) Uganda: mixed, with extraversion (chapter 5) Nigeria: initial engagement (chapter 6) Liberia: low-medium (chapter 7) Sierra Leone: high (chapter 8)
2. U.N. Draft Convention;	South Africa: leadership (chapter 2 and 5)
3. National legislations governing PMSCs and their activities	South Africa: leadership (chapter 5 and 10)

Relevance of IR, norms and regime for Africa

The relationship between Africa and International Relations as a discipline has been marked by the dominance of perspectives in IR that have sometimes dismissed Africa as a weak and marginal continent. Cornelissen et al. argued that Africa is generally under-represented in the mainstream IR scholarship and is mostly left out of the theoretical debates.”³⁶⁴ Thus, the use of IR concepts, like regime theory, that I have so far proposed must recognize the question about whether the “values, assumptions and norms that the discipline of IR explicitly or

³⁶⁴ Scarlett Cornelissen, Fantu Cheru and Timothy M. Shaw (eds) *Africa and International Relations in the 21st Century* (Basingstoke, Palgrave Macmillan, 2012)

implicitly promotes are neutral and universal, or whether there are tensions between the underlying assumptions of IR and African studies”.³⁶⁵

In other words, do IR concepts like regime, globalization, or sovereignty leave any agency to African politics? My assumption is that agency can be found in African states. Jean-François Bayart criticized the arguments that Africa is either marginalized from the rest of the world, an exploited periphery perpetually bound in a dependent relation to the center. He showed that “the leading actors in Sub-Saharan societies have tended to compensate for their difficulties (...) by deliberate recourse to the strategies of extraversion, mobilizing resources derived from their (possibly unequal) relationship with the external environment.”³⁶⁶ The study of agency informs scholarship and policymaking and *perhaps is in the process of becoming a new orthodoxy*, according to Chabal, who writes that agency is defined as directed, meaningful, intentional and self-reflective social action (Chabal p.11).

My assumption on agency is explored in the case studies. First, the national legislation of post-conflict Sierra Leone became a source of practice for PMSCs governance in the Montreux Document. Second, the Liberian state was one of the actors that shaped the increase permissiveness in the use of PMSCs at sea. Third, South Africa led on several fronts, from domestic regulation to the involvement with the Montreux Document and with her leadership

³⁶⁵ For a recent examination, cf. the forthcoming Africa’s International Relations: Sovereignty, Extraversion, and China. *African Affairs*, (2015). Brown argues that “sovereignty remains a central organizing device” in African politics, and this “reinforces rather than questions the relevance of International Relations to African studies”. Mohan and Lampert pick up the important theme of African agency, arguing that at various levels African actors have negotiated, shaped, and even driven Chinese engagements in significant ways

³⁶⁶ Jean-François Bayart, ‘Africa in the World: A history of extraversion’, *African Affairs* 99, 395, (2000), p.218

in U.N. Draft Convention. On balance, the ‘marginalized’ continent has offered more policy direction on PMSCs governance than Asia or Latin America.

Having delineated African states as rational actor with independent agency, I explore the influence of global change on the continent, or the *second image reversed*.³⁶⁷, i.e. the direct and indirect role of the United States and China, as chief signatories of Montreux and major player in the African continent. Liberia’s choices were set within a wider process, with two U.S. PMSCs rebuilding the army, the special police and the justice sector. An account is offered by one of its creators: *The Liberia program is unique even from the programs in Iraq and Afghanistan in that it was entirely outsourced to the private sector. (...) DynCorp’s profit motive drove it to find innovative, efficient, and effective solutions to thorny security problems, and this accounts for some of Liberia’s success today*³⁶⁸. On the other hand, I look at China’s involvement through the lens of countries where Chinese PMSCs operate and I assess the Chinese input to the Montreux initiative and the U.N. treaty.

Not surprisingly, research on private security provision simplified or disregarded the question of agency. It is claimed that the “elites abandon the public security system” and Haugen argued that "throughout the developing world, public justice systems are being replaced with private systems of security and dispute resolution"³⁶⁹. These questions directly evoke a debate that has a long history in political economy of development and in the study of African politics. What is the logic that the author of the *Locust Effect* describes? Hauger seems to evoke the standard

³⁶⁷ Gourevitch, Op. Cit.

³⁶⁸ McFate, Sean. *Building Better Armies: An Insider's Account of Liberia*, 2013. McFate is one of the three individuals who spearheaded DynCorp’s effort. ”

³⁶⁹ Haugen (2014) *The Locust Effect: Why the End of Poverty Requires the End of Violence*. Oxford University Press

account of the deleterious effects of elite behavior in Africa *that highlights their greed and dishonesty* (Chabal 2013).³⁷⁰

Thus, there is here an added reason that invites an exploration of agency in international regulatory cooperation around private security. The agency and the role of the state has been central in political economy approaches as well at least since stabilization and structural adjustment policies were associated with major reductions in the size and scope of the state³⁷¹ so this question has relevance for the debates on privatization in general- i.e. the reduced the role and functions of the state as its role as a direct producer of goods and services.

Hauger's hypothesis on how African elites contributed to "private systems of security and dispute resolution" could imply a non-negligible responsibility of African elites. I shall inquire whether and how African elites contribute and influence regulatory choices³⁷². This is a perspective that development literature stressed. Elite choices can have an autonomous impact on developmental performance. Lewis showed for example that at the state-level elite coordination can be a key or a hindrance to successful development.

My research suggests that the elites' role is not as uniform. Neither Sierra Leone, nor Liberia and Nigeria can offer explicit corroboration of Hauger's account. South Africa even challenged the unregulated global growth of "private systems of security".

³⁷⁰ One version transmutes into the contention that the crisis is both inevitable and intractable, which implies that Africans lack agency- cursed as they are by their own institutions and traditions. Hence the discourse of agency is in part an attempt to combat the causality of what is called *Afro-pessimism* (Chabal, *ibid*, p15)

³⁷¹ I refer to Van de Walle, *African Economies*.

³⁷² My general inspiration here is two-fold. First, Lewis' *Growing Apart; Oil, Politics, and Economic Change in Indonesia and Nigeria* led me to consider how elites and business groups can influence regulatory choices. In the same vein, insofar as I stress the *political* origins rather than regulation itself, I take stock of Mattli and Woods' warning that the political basis of global regulation is central in order to understand whether regulatory change benefits narrow interests or achieves wider public purposes. The regulatory process can be manipulated and captured; it can emerge without an outcome for the common interest.

Evolution of the anti-mercenary norm

In the introduction, I described part of the intellectual and social history of the anti-mercenary norm and built the theoretical expectation that the norm has been reformulated but is still influential.³⁷³ In Africa, more than elsewhere, the anti-mercenary norm can coincide with a puritanical condemnation of the use of private force in all forms.

The anti-mercenary norm is by far the strongest driver or inhibitor of regulatory cooperation both at the state level and an inhibitor at the continental level. At the state-level, it can be overcome- like in the case of Madagascar, which engaged, rejected, and then eventually endorsed the Montreux Document.³⁷⁴ The Prime Minister underlined his country's support for the Document by stressing the importance for Madagascar of human rights and international humanitarian law.

In the case studies, I try and identify who adopts which norms and who are the advocates of what. I ask how do ideas come to prevail, and what linkages they have to the political power. In Nigeria the anti-mercenary norm works against my expectation- it actually shapes the initial engagement with Montreux. In the former case, my hypothesis is that policy-makers try to escape the conventional definition that would deem STTEP a mercenary outfit. Thus, they are led to consider the regulatory cooperation for the first time.

In South Africa the dynamic produced engagement and contestation. A minister claims that “mercenaries are the scourge of Africa”. He signifies that the anti-mercenary antipathy of post-apartheid politics is amplified by a failure to create effective domestic control over the flow of fighters to Equatorial Guinea and Iraq. I shall explain how the anti-mercenary norm leads to the engagement and subsequent contestation of the Montreux process.

³⁷³ Cf. Introduction, *Theoretical Expectation on the anti-mercenary norm*

³⁷⁴ Cf. Chap. 9

In the interplay between interests and ideas, popular ideas can be used to propagate and legitimize elite's interests. The narrative articulates the construction of interests- be it national interests or economic interests, because interests are *not obviously discovered by self-interested, rational actors but rather, they are constructed through a process of social interaction.*³⁷⁵ In the extreme form, idea could be just 'hooks' and not play an independent role.³⁷⁶ When states engaged with, signed the Montreux Document, or chose to begin a domestic regulatory process, I assess interest-based explanations. I find the interest-based explanation particularly plausible in Uganda. Her association with Montreux amounts to a strategy of extraversion with state choices shaped by informal networks between state and business.

PMSCs in Africa

The development of regulatory preferences in Africa has to contend with the nature of contracting and the distinct features of PMSCs working in Africa. I described the broad features of the political economy of PMSCs in the introduction. Here, I specify their activities and I describe the unique engagement of Chinese PMSCs.

Private security activities in Africa can be more specifically described as composed of the protection of assets and persons in land; activities organized around the safeguard of peacekeeping, humanitarian, diplomatic missions, and to a degree, the activities for protection

³⁷⁵ Katzenstein, Peter J., ed. *The culture of national security: Norms and identity in world politics*. Columbia University Press, 1996. p.

³⁷⁶ Goldstein and Keohane, Op. Cit., Introduction

of maritime trade and maritime activities. The main activity for PMSCs in the African continent is the protection of assets and investments on land. Local and international PMSCs protect trade, infrastructure, and resource extraction activities in a number of African countries. Firms also participate in operations against terrorist or criminal organizations from the Sahara desert to Kenya; they provide support to multi-lateral interventions led by the United Nations or the African Union³⁷⁷. The case study of Nigeria in chapter 6 illustrates how one firm, Specialized Tasks, Training, Equipment and Protection (hereinafter, STTEP) is integrated to the Nigerian army in the battle against Boko Haram. However, the majority of PMSCs operate outside of armed conflict.

G4S is the prime example of a large international PMSC in Africa. G4S is a founder signatory of the International Code of Conduct for Private Security Providers although the firm generally defines herself as a *global provider of security* to the public, not a PMSC. Globally, G4S has 623,000 employees in over 110 countries. In Africa, it is the largest employer in the continent with 125,000 employees and operations in 24 countries.³⁷⁸ G4S protects ports, like the Tangier-Med Port, one of the largest capacity ports in Africa, and energy projects, like the £500 million Lake Turkana sustainable energy project in Kenya, part of a public and private sector joint initiative.³⁷⁹ The firm operates in South Africa and has a number of important contracts in Sierra Leone, partly as a result of the takeovers and eventual incorporation of other firms³⁸⁰ and where it was able to continue operations during the Ebola crisis.³⁸¹

³⁷⁷ I deal with the regulatory aspects of this nexus in Chapter two. A significant number of multilateral peace-keeping and peace operations have been launched to address African conflicts. By the end of 2013, eight of the UN's 15 peacekeeping missions were in Africa, and involved 70 per cent of all UN peacekeepers deployed globally. Notably, PMSCs have been involved in the peacebuilding process in Liberia and the United Nations/African Union Mission (UNAMID) in the Darfur region of western Sudan.

³⁷⁸ Annual Report, available at: <http://www.g4s.com/~media/Files/Annual%20Reports/AR%202014/Full%20ARA.pdf> , Accessed July 30th 2015

³⁷⁹ Ibid.

³⁸⁰ Partly as a result of the presence of Wackenhut and the South African company Gray Security in the country prior to their takeovers by Group4 and Securicor and eventual incorporation into G4S. Abrahamsen and Williams, Op.Cit, p. 149

³⁸¹ Cf. Chapter 8

Finally, PMSCs protect maritime trade and maritime activities. By 2012, approximately 40% of the 42,500 vessels that transit the Horn used armed guards but while these firms use African ports, they are often based elsewhere. This activity represents a smaller share than the market on land³⁸² but a growing one.³⁸³

PMSCs on board ships have opened a complicated and long cooperation process, with new policy problems for African states. First, the presence of armed guards on ships poses new challenges related to the movement of armed guards and arms in ports and territorial waters; second, liability issues arise from guards' use of force and firearms.³⁸⁴ Small arms control challenges led to the development of *floating armories*, which are vessels- part storage depot, part housing- positioned in high-risk areas of international waters.³⁸⁵ Armories themselves could be targets for attack by pirates or terrorists and they could circumvent national laws limiting the import and export of weapons.³⁸⁶

Chinese PMSCs in Africa: Origins and Significance

The growth of PMSCs I have described should not overlook a parallel development: the growth of Chinese corporate security. At the forefront are firms like Shandong Huawei Security.

³⁸² Cullen and Berube, Op. Cit.

³⁸³ A source forecasts the global maritime security market to grow from \$13.94 billion in 2014 to \$20.87 billion in 2019, at a Compound Annual Growth Rate (CAGR) of 8.4% from 2014 to 2019. Available at: <http://www.marketsandmarkets.com/Market-Reports/maritime-security-market-1033.html>, Accessed April 8, 2015.

³⁸⁴ Escalation at Sea: Somali Piracy and Private Security Companies, by Nicolas Florquin, 2012. In Small Arms Survey, Available at: [Small Arms Survey 2012: Moving Targets](#).

³⁸⁵ They house weapons and ammunition, as well as guards on board who wait, sometimes for months, for their next deployment.

³⁸⁶ In a 2012 report, the U.N. Security Council committee on Somalia and Eritrea said that the armory business was "uncontrolled and almost entirely unregulated, posing additional legal and security challenges for all parties involved." More recently, the HRC called attention to the use of private security and "floating armories" (...) and the specific challenges included: jurisdiction issues linked to "flags of convenience"; weapons storage in the context of "floating armories" in international waters, including possible circumvention of national laws limiting the import and export of weapons.

Patey to writes in the *New Kings of Crude* that Chinese security firms, such as Shandong Huawei Security Group, are *part and parcel of the protection of Chinese interests abroad and part of an increasingly complex relationship between Chinese National Oil Companies and Beijing*.³⁸⁷ The group operates across Africa and is training thousands of guards at their international training school with Australian supervision.³⁸⁸

It is hard to see a uniform pattern for the Chinese *public-private assemblages* but Huawei is certainly at the forefront. In South Africa, for example, Huawei Security Group created a joint venture between a local company and a number of Chinese resource and logistics firms.³⁸⁹ With time, Huawei may be able to compete with G4S, a group that is presently unrivaled in Africa. However, while G4S was a founder signatory of the ICoC, Huawei was not.

Thus, it is important to trace and understand the origins of Chinese PMSC in Africa. At the time of writing, Frontier Services Group, a traded logistics and aviation company based in Hong Kong, and founded by Citic Group, China's largest state-owned investment firm, with the involvement of Erik Prince.³⁹⁰ Yet, few authors have investigated such origins.

I previously wrote on one of the earliest documented uses of Chinese contractors in Africa and argued that the development of security choices between China and African states can be traced to the use of contractors after the attack on the capital of Sudan of 2008.³⁹¹

It is important to trace a narrative that helps explain the politics of cooperation and why the

³⁸⁷ He cites Daniel Houp Assessing China's response to kidnapping abroad.China Brief, 10, 2012. Patey 2014:258

³⁸⁸ Australian MSS Security, signed a partnership with Chinese private security company Shandong Huawei in 2012. Cf. <https://www.themonthly.com.au/issue/2014/may/1398866400/james-brown/guns-hire>, accessed October 2015

³⁸⁹ Mail and Guardian, 21st December 2014. Available at: <http://mg.co.za/article/2014-12-21-first-china-sa-security-services>, accessed 27th December 2014. A Memorandum of Understanding stated the terms of collaboration between HW Raid Security and China Minmetals First ChromeMining Co, China Zendai Group and China Xinguang Industrial Group was signed.

³⁹⁰ Cf. a series of articles by Matthew Cole and Jeremy Scahill, available at: <https://theintercept.com/2016/03/24/blackwater-founder-erik-prince-under-federal-investigation/> Accessed April 16, 2016

³⁹¹ Boggero, 2014, Op.Cit.

recent Petroleum Act of 2012 explicitly acknowledged private security companies in Sudan³⁹².

In Sudan 2005, a peace agreement paved the way for the independence referendum, and then separation of South Sudan, in 2011. The partition took place relatively peacefully but both countries were on the brink of war several times because of a number of unsettled issues including border demarcation and oil.³⁹³

Chinese contractors first entered Sudan in this climate of cyclical insecurity and amidst the global economy's booms and bust, and associated to the oil police, and the international patronage for resources. It is presumably in 2008 that firms started to operate. As Africa had gradually privatized security over two decades, Sudan was the only country that never did and it is worth noting that no foreign firm had been allowed to deploy security teams before 2008.

Instead, Sudanese and Chinese security teams started working in close collaboration. This hybrid is reminiscent of the security assemblage that has taken place in Nigeria.³⁹⁴ As the Niger Delta security worsened, oil companies integrated public forces into their private security operations. A similar course may have been chosen in this case, as dangers increased over the course of 2008.

It is a plausible hypothesis that the arrival of private security can be traced to the attack on the capital, Khartoum, of 2008, an event that vividly shifted the battleground from the periphery to the center. Despite decades of warfare, Khartoum had not experienced fighting in its streets since 1976. A curfew was imposed, the airport closed down. Many of the regime elites were

³⁹² James, L.; Fields of Control: Oil and (In)security in Sudan and South Sudan . *Small Arms Survey*, Graduate Institute of International and Development Studies, Geneva 2015. <http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP40-Oil.pdf> , accessed November 22nd 2015. The author notes that many PMSCs employ demobilized SPLA soldiers.

³⁹³ What follows is based on Boggero, M. "Private Security and Governance in Weak States: new and old cases." *Sudan Studies Association Newsletter* 24 (2014).

³⁹⁴ Abrahamsen and Williams 2010: 137-39

forced to go into hiding for the first time. The theatre of war remained no longer in distant places, the frontline shifted dramatically, thus providing perhaps new perceptions of security at home and abroad.

Thus, Sudan rewrote private security companies into the legislation with the Petroleum Act of 2012. Similarly, the country also participated to the regional dialogue on the challenges and good practices of regulating PMSCs in the region but has not endorsed the Montreux Document.³⁹⁵

³⁹⁵ The second Regional Conference on the African continent, was held on 11th November and attended by 16 states from the Anglophone African region; cf. <http://mdforum.ch/en/regional-conference-pmscs-addis-ababa>

CHAPTER 5

CONTESTATION OR ACCOMMODATION

The following chapter shows the varying influence of the anti-mercenary norm. In South Africa, the anticipation on the norm is partly confirmed with electoral politics contributing to exacerbate it. Against the theoretical expectations, the norm is defused by political elites in contexts such as Uganda.

I proceed to contextualize how changes in foreign enlistment stir the anti-mercenary norm; I then use the method of process tracing to illustrate how such changes activated the norm and shaped South Africa's preferences towards the Montreux Document. I then contrast the trajectory of Uganda, another signatory of Montreux, where the anti-mercenary norm played no role in spite of foreign enlistment reaching ten to twelve thousand.

5.1 What do we mean by Foreign Enlistment or Third Country Nationals?

The phenomenon of Third Country Nationals (TCN) consisted in the reliance of PMSCs on foreign employees, hired from lower-income countries for a variety of tasks in the security area- including guarding military bases, facility maintenance, guarding checkpoints or sensitive infrastructure.

The issue of TCNs became associated with a chief weakness of international regulation and the Montreux Document- i.e. the absence of protection for a category of employees. It has been noted that TCNs, particularly those working in developing countries and areas near battle zones, seem especially susceptible to forced labor and human trafficking.³⁹⁶ This topic was highlighted in the Montreux Document's Shadow Report.³⁹⁷

Percy writes that the foreign enlistment by PMSCs was not considered problematic for Western policymakers due to the fact that neutrality laws have never banned foreign recruitment. As Percy explains, the 'real purpose of the neutrality laws was to prohibit the commission of unauthorized acts of war by individuals *within* their countries. In fact, the American legislation was shaped in response to an incident sparked by privateering rather than mercenary enlistment. Overseas recruitment of PMSCs was, however, problematic.

How did domestic politics lead to permissiveness or opposition to foreign enlistment? Why did some countries deported foreigners for attempting to recruit local nationals? Why did Zambia or Namibia denied the authorization while Uganda allowed it? In most cases, policy entrepreneurs exacerbated existing anti-mercenary feelings and prevented recruitment. Only in two cases recruitment succeeded. Permissiveness was authorized by Uganda's political elites who gained from it. On the other hand, South Africa deemed PMSCs recruitment in conflict with her domestic laws. The failure to create effective domestic control over the flow of fighters and the coincidence with electoral politics amplified the anti-mercenary norms of post-apartheid politics.

³⁹⁶ Ibid., DCAF Report, other literature

³⁹⁷ *The States of origin (of Third Country Nationals) may not fall under the current categories of Contracting, Territorial, or Home States. For example, in Chile's situation, some of its citizens were contracted by U.S. companies through non-U.S. based hiring firms under contracts that referenced neither Chilean nor U.S. law. The Montreux Document's State categories do not directly address this situation.* Perret in DeWinter-Schmitt, p. 38. It should however be mentioned that the Montreux Document refers not only to the home, contracting and territorial states but also to all other states including therefore the third country nationals.

In Zambia, recruitment was deemed to have violated national anti-mercenary rulings.³⁹⁸ Zambia deported foreigners for attempting to recruit local nationals. A similar story occurred in Namibia; the approval seemed forthcoming only to be later denied. *Many were excited about the arrival of a firm, an "international force protection" company with clients that include the US Army and Marine Corps. (...) local newspapers reported that the government had originally given the company permission to set up a branch in Windhoek, the capital.*³⁹⁹

The case of South Africa and Uganda, two signatories of Montreux, are both outstanding. While my main focus remains South Africa, I here use elements of a paired-case comparison that help the reader appreciate the main case.

Beyond South Africa and Uganda, the recruitment of Africans for deployment overseas has been limited. It was not negligible in Kenya and in Sierra Leone⁴⁰⁰; some were recruited as employees of PMSCs in maritime security but in trivial numbers and only from South Africa⁴⁰¹. Thus, my case selection is somewhat constrained by the fact that few other African countries were used for the enlistment of TCNs.

5.2 Existing explanations for Foreign Enlistment

Economic logic is insufficient to understand the recruitment for the Market for Force. What determined or constrained events was something else. A complex chain of events started with

³⁹⁸ Cheap Labor for Private Security, By Jody Ray Bennett for ISN, 2009. <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?ots777=4888caa0-b3db-1461-98b9-e20e7b9c13d4&lng=en&id=98671>

³⁹⁹ Private Security Contractors Look to Africa for Recruits, Stephanie Hanes, The Christian Science Monitor, Tuesday 08 January 2008.

⁴⁰⁰ cf. Mynster Christensen, Maya. (2014)

⁴⁰¹ 0,6% of the total; cf. OMB Report 2013; Available at: http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital_0_0-1_0.pdf

the U.S. government policy decision to outsource tasks to foreign employees, the initial cause of the phenomenon, driven by the unique dynamics of the Iraq conflict.⁴⁰²

While it may appear that the global market for force was driven by the differences in relative wages and labor demand in states with high unemployment, the market alone does not explain the distribution of Third Country Nationals. A cross-national study of recruitment shows that historical-structural drivers, such as military reputation, explain the enlistment.⁴⁰³ For example, the employment of labor from Chile or Uganda was due to the country's military reputation and ties to the United States. Similarly, Fijian soldiers had helped combat the Japanese in World War Two, and gained a reputation as fierce and disciplined soldiers.

This is not enough, however, to explain state choices. The policies of territorial states crucially delineated the global market.⁴⁰⁴ Some states permitted enlistment; others did not. Firms and entrepreneurs embarked in a search for labor the world over in a truly global market for security, from Uganda to Namibia, Mozambique, Burundi. At times, governments opened their doors. Other times, they did not.

5.2.1 What aggravated the anti-mercenary norm

In South Africa, the anti-mercenary norm lingered in post-apartheid politics and was amplified both by foreign enlistment and by the Wonga coup. The anti-mercenary norm by itself was not an autonomous driver of state preferences and regulatory cooperation.

⁴⁰² Not the Afghan war. Note that the use of TCNs differed between Iraq and Afghanistan due to the different relationship that U.S. forces had with local armed groups. In the former case, the U.S. had disbanded the army. In the latter case, Afghans were employed in the private security sector and there was no great reliance on TCNs. One could speculate that had the Iraqi army not been disbanded, the need for TCNs would not have emerged.

⁴⁰³ Döring, Katharina. *Chilean professionals, reliable Fijians and affordable Ugandans: Transnational Recruitment for the Private Security Sector in Iraq, 2003-2011*. Diss. 2014.

⁴⁰⁴ The Montreux Document distinguishes between territorial, home and contracting states (cf. chapter 2)

During the attempted coup in Equatorial Guinea, the activation of the social antipathy and rhetorical devices associated to the anti-mercenary norm was also associated to electoral politics amplified the tone and resonance of the norm. Second, the problem of enlistment the difficulty in the application of domestic laws related to the *identification of armed conflict* which shaped state choices towards regulation.

5.2.2 Domestic reverberations of the Wonga coup

Before the Iraq War, the attempted coup in Equatorial Guinea had high resonance in South Africa and shaped the belief that laws were ineffective. Two reasons defined the significance of the coup and strengthened anti-mercenary feelings.

First, the coup attempt started unfolding in the midst of South Africa's third democratic election campaign. President Thabo Mbeki and was fighting internal and external opponents when on March 7, the first South Africans were arrested in Harare. Elections were only one month away. Unpredictably, all was happening at once: first, the death of the first South African employed in Iraq as security contractor in January; then, Alberts and Rouget were arrested for mercenarism in Ivory Coast.⁴⁰⁵ Then, the coup in Equatorial Guinea. On March 10, Nick du Toit was paraded on TV in Equatorial Guinea. *Two of the Africa's most reviled and ignored dictators, Zimbabwe's Mugabe and Equatorial Guinea's Obiang Nguema, became saviors of post-colonial Africa* (Pelton 327).

⁴⁰⁵ In 2002, South African Carl Alberts and French-born South African Richard Rouget, worked in Ivory Coast. The former officer in the French army became the first person convicted of mercenary activities under the 1998 legislation. He admitted recruiting fighters for the Ivory Coast conflict and was sentenced to either five years in prison or a fine equivalent to US \$14,500. He paid the fine. <http://mg.co.za/article/2004-03-03-sas-security-experts-defy-the-law>. Rouget then went on to work in the USA as a *governance mentor*. Cf. www.bancroftglobal.org, website accessed March 4, 2014

The government may be punished at the poll for the inaction, with internal ANC politics already marked by tumultuous conflict. Mbeki tried to suppress competition and extend his hold on power by maintaining the presidency of the ANC; Lekota, a challenger for the job, was given the poisoned chalice of the defense ministry⁴⁰⁶.

5.2.3 Iraq War: effects of Foreign Enlistment on the anti-mercenary norm

While the Equatorial Guinea case came to a close, the Iraq war endured. The participation of South Africans in the war became unequivocal: an initial estimate of two thousand in Iraq increased to five thousand in mid-2006⁴⁰⁷. Criticisms to the government rose as wounded returnees from Iraq came back.

Among the South Africans involved, there were former leaders of the apartheid state army and police. The participation of many former Executive Outcomes veterans also made it seem like business as usual for the apartheid cowboys⁴⁰⁸. Political entrepreneurs could proceed to use the heightened anti-mercenary antipathy and claim “mercenaries are the scourge of Africa”.⁴⁰⁹

⁴⁰⁶ Mbeki's competitor eventually made it to the ANC presidency in 2007 (*Gumede 2005:316*). *Gumede also writes: Lekota made a comeback and blocked attempts by Mbeki to capture the six top positions in the ANC (...) in 1999 he grudgingly gave Lekota the poisoned chalice of the defense ministry in the hope that his impeccable credentials would be tainted by a stint in the hot seat*

⁴⁰⁷ Scahill reports two thousand (Scahill 2007:431). Legal advisers from the defence department Siviwe Njikela report 5000. *Business Day* (Johannesburg, South Africa) - Wednesday, June 7, 2006

⁴⁰⁸ Slap on wrist will not stop apartheid cowboys. *Business Day*, Johannesburg, South Africa, Tuesday, April 13, 2004

⁴⁰⁹ Defense minister Lekota, in Scahill 2007:432

Engaging with Montreux in 2008 seemed like a sensible option because of the main concern that *foreign states and companies must respect the South African law and refrain from recruiting South African nationals*.⁴¹⁰

As the problem of TCNs rose, South Africa engaged its counterparts but periodically threatened to opt out. At the “Montreux + 5” conference, the withdrawal from Montreux is seriously considered. On the eve of the conference, Gumedze writes: *the only document which links South Africa to the Montreux Document is the Department of International Relations and Cooperation (DIRCO) Strategic Plan 2010-2013 (Strategic Plan)*⁴¹¹.

5.2.4 Other factors

At that juncture, norms partly shaped preferences about international regulatory cooperation but this is not to say that other factors did not exist. Fragmentation and capacity problems constrained outcomes. Hardly a robust structure before, the NCACC has had less and less of the required clouts to make authoritative claims. With the transition from Mbeki to Zuma, policy coordination became even less clear and the NCACC was never strengthened.⁴¹² Besides, there were at least two other capacity problems. First, as the numbers of involved South Africans grew, individual prosecutions would be harder to carry out. Second, new extraterritorial responsibilities in *territorial* states created a new problem of capacity- for

⁴¹⁰ Ibid.

⁴¹¹ S. Gumedze (2013) in the Shadow Report to Montreux Document. *The document states that DIRCO will, among other things “consider, supporting and participating in the Swiss Government’s initiative to disseminate the Montreux Document on Private Military and security Companies.”*

⁴¹² Email correspondence with John Siko, February 2015.

example, governments must provide consular assistance to families of PMSC personnel under investigation if they get problems in countries where they operate.⁴¹³

Beyond capacity, international factors prevented effectiveness and shaped South Africa's international engagement. In fact, the new law passed, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006, was once again ineffective. On the one hand, it depended on a notion of armed conflict poorly defined,⁴¹⁴ reflecting the unresolved question of how to delimit armed conflict and what is direct participation to hostilities⁴¹⁵. Second, there was a difficulty in identification. The broader definition of services and assistance contained in the bill cast a wide net that included all actors in armed conflict employing South African nationals.⁴¹⁶ In an attempt to identify Third Country Nationals, the law outlawed the activities of United Nations peacekeepers and humanitarian workers as well⁴¹⁷.

⁴¹³ Cited by Amb. Abdul Minty, cf. http://psm.du.edu/media/documents/reports_and_stats/think_tanks/iuhl_minty_south-africa_2012.pdf, Accessed March 8, 2015

⁴¹⁴ The legal adviser of the South African Police Service said there was no formal way of deciding when armed conflict began or ceased in international law. Business Day, Johannesburg, South Africa, June 7, 2006. For a definition of armed conflict, ICRC proposes the following definitions, which reflect the strong prevailing legal opinion: 1. International armed conflicts exist whenever there is resort to armed force between two or more States. 2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation. cf. <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, Accessed March 15, 2014

⁴¹⁵ Cf. Melzer, Nils. "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law." (2009). Available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, Accessed September 22, 2014 Melzer, Nils. "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities." *NYUJ Int'l L. & Pol.* 42 (2009): 831

⁴¹⁶ The issue came up during the discussion of the bill. Jacobs also said the committee should consider exempting certain recognised international organisations, such as the International Committee of the Red Cross, from being regulated by the bill. Business Day, Johannesburg, Wednesday, June 7, 2006.

⁴¹⁷ Heitman, unpublished document provided to the author. "The Act renders third country nationals potentially liable to arrest in South Africa for providing medial or other emergency services in a country or area that South Africa has deemed to be in conflict or where conflict is deemed imminent"p.2. "

5.3 Accommodation with Montreux: Uganda's strategy of extraversion

At the other end of the spectrum, the opposite policy developed in Uganda. The case illustrates a choice where Montreux is associated to the endorsement of foreign enlistment and used as an added 'extraversion' strategy for domestic political and material benefit.⁴¹⁸

Unlike South Africa, Uganda was not an original signatory of Montreux. The signing of the Montreux Document was a standalone act. Uganda has not participated to debates on PMSCs regulations at the United Nations, and did not attend the diplomatic conference Montreux+5, and similarly disregarded the developments of the Montreux Forum.⁴¹⁹

As South Africa was pursuing a principled and sustained opposition to the foreign enlistment, Uganda's network of state and business created a flow of recruitment. Local entrepreneurs like Bob Kasango, an attorney at an influential law firm in Kampala initiated the transfer of labor by linking the Washington based security provider firms to the Ugandan security company Askar.⁴²⁰ Entrepreneurs like Kasango, a relative of Salim Saleh, the younger brother of president Museveni, and companies like Askar ensured that an estimated ten to twelve thousand Ugandans served in Iraq.

In Uganda, state policy acted as a key enabler. Ugandan authorities could have stopped the flow at an early stage, like Zambia or Namibia. Following complaints on deteriorating working

⁴¹⁸ Some of the classic studies of 'extraversion' are Patrick Chabal and Jean-Pascal Daloz, *Africa Works: The political instrumentalization of disorder* (Indiana University Press, Bloomington, IN, 1999); Jean-Francois Bayart, *L'État en Afrique: la politique du ventre* (Fayard, Paris, 1989); Christopher Clapham, *Africa and the International System: The politics of state survival* (Cambridge University Press, Cambridge, 1996)

⁴¹⁹ Author's interview. March 2015

⁴²⁰ The New Vision, cited in Döring, Katharina. *Chilean professionals, reliable Fijians and affordable Ugandans: Transnational Recruitment for the Private Security Sector in Iraq, 2003-2011*. Diss. 2014, p.35

conditions, signals emerge of a possible temporary halt on official recruitment⁴²¹. When in 2005 the first Ugandans left for Iraq, Döring writes:

*While ministers criticized this labor export, they were in turn blamed for not doing enough to create employment that would prevent people from seeking jobs abroad. The parliament was urging the government to investigate the situation, but Foreign Affairs Minister Sam Kutesa simply stated that neither was the government involved in the recruitment, nor did it want to interfere. Eventually a meeting between his office and the recruitment companies was arranged. It included the clarification that people would only go as private individuals and were themselves responsible for their working conditions and security in Iraq.*⁴²²

A plausible supposition is that personal networks between state and business informally sanctioned policy. Analogous state-business networks did not exist in South Africa. One firm, headed by Kellen Kayonga, a relative of Salim Saleh.⁴²³ Salim Saleh, used to be involved in Branch Energy, and more recently in Saracen Uganda, a subsidiary of a company formed from the remnants of Executive Outcomes.⁴²⁴

Substantial benefit accrued to government coffers. The Ugandan government cites revenue of 90 million USD per year; “while the traditional main export of coffee brings only 60 to 70

⁴²¹ The respective special division had only one employee and a limited budget (Izama 2007a in Döring), p.37

⁴²² Döring, Op. Cit.p.37

⁴²³ Gyezaho, 2006 in Döring. For a biographical account cf. Drohan, Madelaine. *Making a Killing: How and why corporations use armed force to do business*. Random House Canada, 2003. pp. 290-319. Drohan accounts include the entanglement in the privatizations of the nineties and Saleh's exploitation of the Ugandan army occupation in Congo

⁴²⁴ A UN report accused General Saleh and other Ugandan officers of using their ties to paramilitaries to plunder Congolese diamonds, gold and timber and it recommended placing financial restriction upon Saracen Uganda. Cf. Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN doc. S/2002/1146. www.un.org/ga/search/view_doc.asp?symbol=S/2002/1146 Accessed March 7, 2015

million US Dollar”, says a cabinet minister⁴²⁵. Some are presumably remittances flows and many individuals used their earned savings back in Uganda to open up small businesses but lack of data on inward workers’ remittances does not allow testing this hypothesis.⁴²⁶

The signing of the Montreux Document a strategy of extraversion that fits with Reno’s suggestion that Uganda’s government “found salvation in African warfare’s role in world politics” as a recognized ally and in the global condemnation of the Lord’s Resistance Army’s use of child soldiers and commission of atrocities.⁴²⁷ The Montreux Document figured in this broad strategy where issues of security have historically shaped state formation and the way the state is rooted in local society⁴²⁸.

Conclusion

Gourevitch reminded scholars that the international context often influenced domestic structures. In an instance of *second image reversed*, the formation of interests and preferences was greatly determined *and* bounded by events taking place in international politics. Yet, this chapter shows how norms were influential: the activation of the anti-mercenary norm depended upon the varying effect of foreign enlistment upon political entrepreneurs and elite beliefs, and on contingencies- such as electoral politics. The case of Uganda showed how norm can be defused by political elites.

In this chapter, I have also noted that foreign enlistment has been mostly ignored by the IR

⁴²⁵ Most media indicate that the source of this statement is Mwesigwa Rukutana, is a Uganda lawyer and politician. He is the current State Minister for Labor in the Ugandan Cabinet.

⁴²⁶ The flow of remittance from security work fits within a trend of significant growth in remittances from US\$299 in 2003 to US\$773 in 2010 (World Bank 2011). The first Uganda Workers’ Remittances Report is from 2008. https://www.bou.or.ug/bou/bou-downloads/publications/TradeStatistics/RemittanceMonitoring/Rpts/All/Uganda_Workers_Inwards_Remittance_Report_2008.pdf accessed February 10, 2015

⁴²⁷ Reno in Harbeson, pp. 162-164

⁴²⁸ Sjögren, Anders. *Between Militarism and Technocratic Governance: State Formation in Contemporary Uganda*. Fountain Pub Limited, 2013.

literature. Historically, the aim of neutrality laws for states was to prohibit unauthorized acts of war by individuals *within* their countries. Thus, most states have never banned *foreign* enlistment. This research has important implications for the debate on private security because the contracting states' preference for TCNs will endure and contestation to regulatory cooperation could re-appear.

CHAPTER 6

NIGERIA's ENGAGEMENT

In January 2015, the government of Nigeria hired a South African firm, called STTEP, as technical advisors in the fight against Boko Haram. Soon afterwards, Nigeria policy circle engaged for the first time with regulatory cooperation. In this section, I explain this choice; I illustrate and problematize this case of contingent contracting which has distinctive features. I then argue that this episode of contracting is the key that drives Nigeria's engagement towards Montreux.

6.1 Context

Several things are notable about the use of STTEP. First, Eben Barlow, the South African veteran who formerly headed Executive Outcomes, led the operations. Second, the work was carried out without South Africa's approval. "We work under the radar as far as possible," Barlow says, "and will never compromise a government or a client"⁴²⁹. Third, the use of STTEP was integrated to the Nigerian army- and presumably to the larger multinational effort. This

⁴²⁹ Ibid.

fit with the current wisdom that contractors operating alone rarely fill the security gap and usually accompany the international community in military interventions.⁴³⁰

Fourth, it could be hypothesized that the military objective was attained *without* apparent loss of state control. “(We worked with the) Nigerian Army division commander in the area of operations who gave us his intent, guidelines, and restrictions.”⁴³¹ At the same time, not enough evidence may be available. It is unknown how these private forces are organized, and how their remuneration will be arranged, a Nigerian government spokesperson was quoted stating ‘that the government is not engaging in “any backchannel or unlawful recruitment”’⁴³².

Last but not least, STTEP was reportedly involved in direct combat.⁴³³ “We did not develop the strategy to destroy the enemy,” Barlow elaborated, and STTEP was indeed integrated within the larger force but their role went beyond the role of “technical advisers”.

6.2 STTEP and the problem of definition

As I wrote in the introduction, mercenaries are difficult to define and conventional definitions revolved around two elements: the foreign status and the motive of financial gain. While a growing community of states endorses the criteria for naming PMSCs, paucity in defining mercenaries has not disappeared.

⁴³⁰ Branovic, Op. Cit.

⁴³¹ Blog post, Jack Murphy: <http://sofrep.com/40633/eeben-barlow-speaks-pt-3-tactics-used-destroy-boko-haram/#ixzz3buTtuECZ>. Accessed June 1st 2015. Also: Barlow advocates, relentless offensive action means immediately exploiting successful combat operations to keep the heat on the enemy. This strategy relies on the synchronization of every asset brought to the battlefield, and applied on multiple fronts against Boko Haram. One of those tactics includes the relentless pursuit of enemy forces.

⁴³² Al Jazeera, ‘Nigeria Acknowledges Presence of Foreign Mercenaries’, 14 March 2015, <http://www.aljazeera.com/news/africa/2015/03/nigeria-foreign-mercenaries-boko-haram-150313122039403.html> (accessed 25 August 2015).

⁴³³ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11596210/South-African-mercenaries-secret-war-on-Boko-Haram.html> His air power unit was “given ‘kill blocks’ to the front and flanks of the strike force and could conduct missions in those areas,” he said.

In this dissertation, I adopted Percy's definition and I have defined mercenaries on the basis of *low* attachment to a cause and *low* legitimate control.⁴³⁴

Adopting Percy's criteria to analyze recent mercenary cases in Africa, I now propose to contextualize the case of STTEP. In what follows, I show that according to *conventional* definitions that rely on foreign status and financial gain, STTEP is a mercenary outfit. With the Percy's definition, it would not.

Following the table below, I proceed in chronological order starting with the case of Equatorial Guinea, Libya, Ivory Coast before returning to Nigeria.

Equatorial Guinea is the classic case of mercenaries of the old kind, à la Bob Denard or Mike Hoare. Simon Mann, formerly at Executive Outcome with Eben Barlow, was accompanied with South African, Angolan, Armenian, German and Sao Toméan colleagues and Mark Thatcher, who funded the operation.⁴³⁵ Because of the foreign status and presumed motivation- financial gain- they would be defined as mercenaries in the U.N. and Geneva Convention. Following Percy, instead, they exhibit low attachment to a cause and low legitimate control. In fact, these individuals could not be presumed to have an attachment to a particular cause or ideology- say, democratization in what is commonly considered an authoritarian context- associated to the fall of the regime in Equatorial Guinea.

Another recent case is Libya, where mercenaries used by the Libyan government to violently suppress political protests. This case is potentially novel as noted by a UN Commission of Inquiry: *there is some uncertainty about whether these foreign nationals meet the international definition of a*

⁴³⁴ Her definition avoids several important conceptual problems inherent to the conventional definitions. Cf. Introduction

⁴³⁵ Cf., the section "the Wonga coup" in Chapter 5

*mercenary. The Working Group agreed with this assessment.*⁴³⁶

Table 7: Recent instances of mercenarism		
Case	Contracting party	Meets definition of mercenary
Equatorial Guinea (2004)	Independent entrepreneur	yes
Libya (2011)	Incumbent government	yes
Ivory Coast (2012)	Both ousted leader and elected new leader	yes
Nigeria (2015)	Incumbent Government of Nigeria (pre-election)	Mixed

⁴³⁶ Rona also note the important point that the Government of the Libyan Arab Jamahiriya departs from the traditional practices witnessed in the Twentieth Century; mercenaries were not used to overthrow the Government: allegedly, they were used by the Government to quell civilian protests. Rona, Gabor. "A tour de horizon of issues on the agenda of the Mercenaries Working Group." *Minnesota Journal of International Law* 22 (2013): 324.

Further, Liberian and Sierra Leonean mercenaries were employed in Ivory Coast. *After the presidential elections, clashes broke out in various parts of the country after the refusal of Gbagbo to concede victory to Ouattara. Mercenaries were recruited by both sides.*⁴³⁷

I can now return to the case of Nigeria and STTEP. Conventional definitions relying on foreign status and financial gain would deem STTEP a mercenary outfit.⁴³⁸ Thus, an outstanding problem of legitimacy is raised by the continued use of STTEP. Does counter-terrorism policy justify the use of mercenaries?

In what follows, I look at the changing threat level and I trace the crucial events that drove policy choices; finally, I suggest that the case of STTEP to shaping Nigeria's relation to PMSCs and shaping preferences towards the endorsement of the Montreux Document.

6.3 Changing threats: Tracing policy choices

In this section, I argue that crucial events- i.e. the high-level attacks and abductions- drove policy choices⁴³⁹, including the hiring of a STTEP. The increase in threat level, *contingent* to the decreased accessibility of military aid, has led policymakers to look for non-state solutions and use PMSCs. Contracting of security occurred *prior* to regulatory cooperation which followed quickly afterwards with an engagement with Montreux that I study in the following section.

⁴³⁷ According to the United Nations an estimated 4,500 mercenaries were recruited to fight in both conflicts in Côte d'Ivoire, with a large number coming from the west, where the country borders Liberia, and from other countries, such as Burkina Faso and Angola

⁴³⁸ Not so for Percy's definition. The criterion of low legitimate control would exclude STTEP from the mercenary definition since it was closely associated to the Nigerian army. Percy made this point when she wrote that historically, *mercenaries were differentiated from other fighters according to the degree of control they were under (and) that differentiation is still sensible today, when legitimate control is provided by the sovereign state and some international organizations composed of sovereign states.*

⁴³⁹ For the theory on information effects, I refer here to Mattli and Woods, Op Cit.

In the context of civil-military strategies of African states, choices revolve between regional intervention, private security and Western sponsored upgrades of state militaries, as Howe put it, increased vulnerability shaped policymakers choices.⁴⁴⁰ The high-level attacks and abductions- created information effects that drove choices towards private security. The most important event was the kidnapping of 250 schoolgirls, in Chibok, Borno State, which drew international media attention. One source explicitly cites this event as the origin of the contract.⁴⁴¹ Nigeria's difficulties in countering terrorism were also associated to other factors, such as technology and independence, but a key aspect was the information effect created by the schoolgirls kidnapping.

Kidnapping is a relatively recent phenomenon in Nigeria; the targets evolved from mostly foreign to a mix of nationals and internationals.⁴⁴² For Boko Haram, it became a tactic increasingly used, with the first kidnapping of foreigners in 2011.⁴⁴³ According to an estimate, 600 people are now kidnapped in the country every year.⁴⁴⁴

In this context, Alex de Waal noted, the abduction of the schoolgirls was momentous: *Boko Haram had been killing, abducting and terrorizing for more than two years before Nigeria's elite or Western actors began to take notice: it took the girls' kidnapping (to spur) a leading instance of 'hashtag activism' – the #BringBackOurGirls campaign.*⁴⁴⁵ After a few months, this major unresolved incident,

⁴⁴⁰ Howe, Op. Cit.

⁴⁴¹ Jack Murphy's interview to Eben Barlow mentions this event as the game changer. "STTEP was contracted to deploy to Nigeria. Their mission was to train a mobile strike force to rescue the Chibok school girls kidnapped by Boko Haram."

⁴⁴² I referred to Oriola, Temitope B, Dr. *Criminal Resistance? : The Politics of Kidnapping Oil Workers*. Farnham: Ashgate Publishing Ltd, 2013. <http://JHU.eblib.com/patron/FullRecord.aspx?p=1164386> (accessed August 11, 2015); also cf. IDEHEN, S. The Legal And Socio-Political Implication Of Kidnapping In The Niger Delta Region Of Nigeria. *Conflict Resolution & Negotiation Journal*. 1, 93-102, Mar. 2012. First case of kidnapping took place in 2005 when militants abducted some expatriates working on the AE fields of Shell Petroleum Development Company

⁴⁴³ Comolli, Op. Cit., P.66.

⁴⁴⁴ *The Economist*. Private security is hollowing out Nigeria's security forces. October 17th 2015. The source cited is Red24, a Scottish security firm

⁴⁴⁵ De Waal, A. (ed.) *Advocacy in Conflict-Critical Perspectives on Transnational Activism*. Chicago University Press (2015). The Nigerian campaign focused equally on Boko Haram and on the Nigerian government, and its ineptitude, corruption and brutality. It criticizes not only Boko Haram's devastating actions, but also the environment that has given the group its *raison d'être* and the ability to conduct such a major attack. Nigerians asked for the return of the Chibok girls, of course, but also for better governance, more security and less corruption. The activist message simplified a complicated story, but it did break through that domestic barrier.

associated to the advent of the national elections in 2015, drew the attention of policymakers around the world.

With the increasing sophistication of the attacks, Nigeria's failure to mount a response may have been associated to other factors, such as technology and independence.

First, a foreign company offered guarantees of independence for rulers wary of the complicity with the militants⁴⁴⁶ - in this line, president Goodluck Jonathan had himself acknowledged that the militants have sympathizers or enablers throughout the government.⁴⁴⁷

Second, and most important, political rulers needed technology that only certain firms were able to provide. In this line, Pham argued that the need has been less a matter of personnel and equipment than training, especially in intelligence and investigations.⁴⁴⁸ The lack of additional U.S. commitment to provide intelligence support drove the leadership to look elsewhere.⁴⁴⁹ The U.S. confirmed its willingness to support Nigeria after the abduction and a resolution introduced by American senators urged the government to assist in a rescue operation. No details were made available, however, of specific support.⁴⁵⁰ Thus, the use of PMSC could have turned into an expedient and pragmatic choice. I suggest that contracting was contingent rather than a strategic long-term policy choice (cf. table in preamble). The

⁴⁴⁶ Authors' interviews, March 2015

⁴⁴⁷ "some of them are in the executive arm of government, some of them are in the parliamentary/legislative arm of government, while some of them are even in the judiciary. Cited in Pham, J. P. (2012)

⁴⁴⁸ Pham, J. P. (2012). Boko haram's evolving threat. *Africa Security Briefs*, (20), 1-8.

⁴⁴⁹ Authors' interviews, March 2015

⁴⁵⁰ Comolli, Ibid, P.144

newly elected government renewed the contract to STTEP,⁴⁵¹ but this does not change the essence of this security privatization: contingent and time-limited.

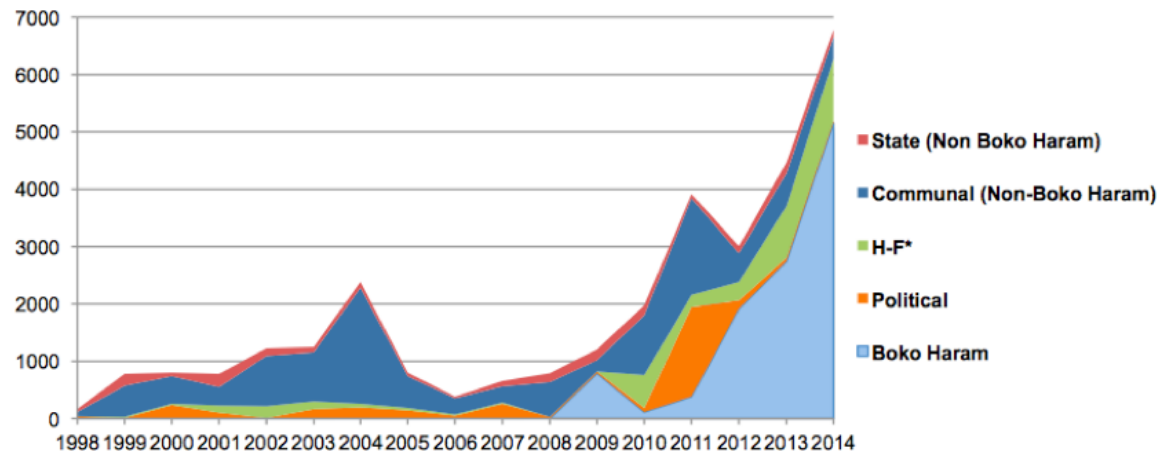
The agency and the role of the state has been central in political economy approaches as well at least since stabilization and structural adjustment policies were associated with major reductions in the size and scope of the state⁴⁵² so this question has relevance for the debates on privatization in general- i.e. the reduced the role and functions of the state as its role as a direct producer of goods and services.

The acceleration in lethality of Boko Haram's attacks are shown in the data gathered by the *Nigeria Social Violence Project*. The table below shows the increased intensity of violence and the distinctive contribution of Boko Haram to such escalation. The surge in attacks in Nigeria, was coupled with increasingly international alliances between radical militant groups in the Sahel, sophistication of its tactics and an attack on the U.N. headquarters in Abuja.

⁴⁵¹ Nigeria Hires S'African Mercenaries Again to Battle Boko Haram. 23 October 2015, <http://www.thisdaylive.com/articles/nigeria-hires-s-african-mercenaries-again-to-battle-boko-haram/223527/>. Accessed November 15, 2015

⁴⁵² I refer to Van de Walle, *African Economies*.

Table 8 Violence and fatalities in Nigeria



Data from the Nigeria Social Violence Project⁴⁵³

Countries across the region responded with a multinational force but the increased threat also led the authorities in Cameroon to the unusual step of advising business, schools and churches to recruit private security agents.⁴⁵⁴ While the hiring of a PMSC in Nigeria may seem like an isolated event, its importance needs to be contextualized.

6.4 Elaborating a new framework

In this section, I argue that the involvement of private contractors may not be an isolated event and could actual reveal a rapprochement towards Montreux.

⁴⁵³ The Nigeria Social Violence Project is led by P. Lewis at the African Studies Program at Johns Hopkins SAIS; Available at: <http://www.connectsafrica.org/research/african-studies-publications/social-violence-nigeria/>

⁴⁵⁴ <http://www.dw.com/en/cameroon-steps-up-security-over-boko-haram/a-18648169>

So far, the Regulatory body for PMSCs has been organized through the Nigeria Civil Defence and Security Corps (NCDSC) within the Ministry of Interior. Many PSCs- and only one PMSCs⁴⁵⁵ - are authorized by NCDSC and contracted by the Federal Government of Nigeria to do anti-bunkering patrol along territorial waters.⁴⁵⁶

So far, the regulatory body overseeing PMSCs had not taken any interest in working within the framework of the Montreux Document but the hiring of STTEP introduced the recognition that international standards are needed. For the first time, the Pan African Strategic and Policy Research Group (PANAFSTRAG) is engaging both the NCDSC and the firms in developing a national framework and a national approach to the Document.⁴⁵⁷

This could indeed reveal to be a key juncture, I argue. Nigerian attitudes reflected a national consensus: Nigerian foreign policy never participated to Montreux events nor to U.N. sessions on private security. Now, almost a decade after the start of the Swiss initiative, there is an indication of change. Further, the strategy includes the possibility of a regional approach: “in the immediate future we will engage ECOWAS and later the AU”⁴⁵⁸.

6.4.1 Relevance of Montreux for Nigeria

Nigeria’s policymakers have for the first time stated an intention to create a national approach to the Montreux Document but how is the Document important for Nigeria? I argue here that

⁴⁵⁵ Armed and made up of Niger Delta Militants with Consultants from foreign PMSCs. Email correspondence, Gen. Ishola Williams, March 2015

⁴⁵⁶ Email correspondence, Gen. Ishola Williams, March 2015

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

Nigeria's signing could play an important part in clarifying the assessment of state responsibility and play a prospective role in promoting PMSC compliance with international law.⁴⁵⁹ Further, the position of Nigeria would be influential on other African states, a nexus that is explained in the concluding chapter.

At this stage, however, I shall describe *how* the Document can be important in clarifying responsibilities and obligations of states towards the use of international private security. Legal scholarship has argued that inappropriate or harmful conduct by a PMSC or a PMSC employee may give rise to international responsibility of any or all of three states, home, contracting or territorial.⁴⁶⁰ In practice, this gives rise to question of responsibility in case say, a PMSC had mistakenly abused, wounded or killed civilians. What would have been the responsibility for states? Would the obligations to prevent and remedy have been clearly delineated?

In the case of the firm STTEP, there are several problems. First, both Nigeria and South Africa could have incurred a state responsibility because Nigeria did not sign the Montreux Document. Nigeria would have incurred a responsibility as a *territorial* and *contracting* state. Additionally, there could be another responsibility of another *territorial* state if STTEP had crossed the border- but this is beyond the realm of the present analysis.⁴⁶¹

South Africa did sign but did not authorize the deal with Nigeria so it could have incurred a responsibility as the *home* state, where STTEP is incorporated. The South African Defense Minister avoided the problem by saying that: "They are mercenaries whether they are training,

⁴⁵⁹ Tonkin 2014:261

⁴⁶⁰ This distinction is introduced in chapter 1

⁴⁶¹ At present, this has not been established

skilling the Nigerian Defence Force, or scouting for them”.⁴⁶² Besides, STTEP is not a member of the ICoC, which poses a problem of legitimacy to the Code.

There are two ways in which such responsibility may arise. The first involves direct attribution of wrongful PMSC conduct to the hiring state, in this case Nigeria; the second - derives from a state failure to prevent, investigate, punish or redress the PMSC conduct.⁴⁶³

States on whose territory PMSCs operate must ensure the respect for IHL, protect human rights of all persons under their jurisdiction, and investigate and prosecute alleged misconduct. The endorsement of the Montreux Document is an initial but significant step in clarifying the assessment of state responsibilities.

Conclusion

In this chapter, I documented and explained Nigeria’s first engagement with regulatory cooperation. I suggested that it was the consequence of a type of *contingent* contracting, rather than a strategic choice. The policy continues subject to the incidence of threat and conditional on other elements.

The agency and the role of the state has been central in political economy approaches as well at least since stabilization and structural adjustment policies were associated with major reductions in the size and scope of the state⁴⁶⁴ so this question has relevance for the debates on privatization in general- i.e. the reduced the role and functions of the state as its role as a direct producer of goods and services.

⁴⁶² “They are mercenaries whether they are training, skilling the Nigerian Defence Force, or scouting for them. The point is that they have no business to be there.”. Foreign Policy, March 27 2015. <http://foreignpolicy.com/2015/03/27/nigeria-boko-haram-south-africa-jonathan/> Accessed 4th May 2015

⁴⁶³ “and does not involve attribution nor state complicity in PMSC misconduct.” Tonkin 2014:261

⁴⁶⁴ Cf. Introduction; I refer to Van de Walle, *African Economies*.

If contingency drives contracting, what normative driver shape engagement in regulatory cooperation? I probed for the influence of the anti-mercenary norm and found a surprisingly result- it drove a rapprochement to regulatory cooperation. I suggested that it is in the interests of the Nigerian state to distance itself from older definitions associated to the anti-mercenary norm. Unlike the trajectory shown in South Africa, one could not contrast the varying influence of the anti-mercenary norm with cycles of electoral politics or international factors, such as foreign enlistment, in shaping preference formation.

Chapter 7

State and Non-State choices in Liberia

The next two chapters focus on the cases of Sierra Leone and Liberia, two strikingly similar contexts that offer a great deal of variation in regulatory choices. The case of Liberia is notable because of the influence of the U.S. in post-conflict reconstruction and also, more surprisingly, because of the role of the Liberian maritime administration in creating the new global rules for security on board ships. In Sierra Leone, regulation was created in the pre-Montreux years and is still shaped by the experience of Executive Outcome. Then, in the context of the recent Ebola epidemic, the regulatory framework of PMSC governance is tested in a context of unprecedented devastation.

I start by showing how the likeness of these two countries allows accentuating the comparative value of the analysis when juxtaposing preferences towards regulatory cooperation. I also draw theoretical expectations for the two cases.

7.1 Preamble

The selection of the two Mano River states of West Africa is germane because of many shared contextual similarities. First, the two countries emerged from civil war and were long considered post-conflict. Second, both countries had experience with external security actors-mercenaries or PMSC *ante litteram*- in the context of armed conflict.

Sierra Leone President Strasser contracted Executive Outcomes, which helped train the loyalist army and push the rebels out of the capital, retake the diamond-mining area, and destroy the rebel headquarters.⁴⁶⁵ Liberia suffered under a mercenary experience. Since Charles Taylor's incursion in 1989, Liberia symbolizes the impact of the rise of violent organized transnational networks interested in exploiting minerals or timber; control over these resources became key during the years of the civil war (1990-2003)⁴⁶⁶.

A continuum linked the two countries' patronage, finances, and violence across international borders. The Sierra Leone war began in 1991 as a spillover from Liberia since Charles Taylor's return in 1989. The war *took a character of its own but retained crucial Liberian links* (Gberie 2005:5).

As Reno writes:

*Charles Taylor used his connections with the RUF to entrench his own position in the cross-border trafficking in diamonds that had been the preserve of members of the prewar government in Liberia. This relationship linked Sierra Leone rebels to the political and commercial interests of their patron in the neighboring country, and not to the productive energies and networks of the aggrieved Sierra Leoneans in areas that they controlled.*⁴⁶⁷

Another conspicuous similarity is that both countries have witnessed protracted phases of violence. The savagery was described for example in Stephen Ellis' *Mask of Anarchy*, a story of

⁴⁶⁵ Reno William, *Warlord Politics and African States*. Cambridge: Cambridge University Press. p.132

⁴⁶⁶ Warlord's authority was based on the control of gold, diamond mining, timber and rubber (Reno, Ibid., 1998:79). For an account of the character of Charles Taylor, cf. Waugh, Colin M. *Charles Taylor and Liberia: ambition and atrocity in Africa's lone star state*. Zed Books, 2011. The author traces some of his influence to Liberia's elite belief that Taylor was an outsider.

⁴⁶⁷ Reno William (2007) Patronage Politics and the Behavior of Armed Groups. *Civil Wars*. Vol. 9, Iss. 4, 2007. p. 330

Liberia's descent into chaos. Sierra Leone became the heart of the new barbarism thesis in in Kaplan's *Coming Anarchy*. The nexus of conflicts uniquely inspired decades of research in the political economy of war⁴⁶⁸. A further correspondence between the two cases was the extensive involvement of international actors during the post-conflict phases, particularly the United Nations with its peacekeeping missions.

Certainly, there are significant differences too. Liberia is more ethnically fragmented political landscape. Ethnic diversity can make it more difficult to form a consensus for growth-promoting public goods⁴⁶⁹. Elections, party-systems and legislatures also differ, and Sierra Leone had more years of experience with multiparty democracy.

However, there are deeper socio-political affinities, like the existence of old decentralized socio-political institutions that govern many rural towns and villages within Sierra Leone and Northern Liberia. Such power associations like the Poro and Sande 'secret societies', share practices and symbolisms. Both Mano River states emerged as lands of freed slaves with patterns of antagonism between the ruling elite- Americo-Liberians in Liberia and Creoles in Sierra Leone- and the indigenes. Further, There are other historical, economic and geopolitical elements that are salient for a comparison, including being coastal states, similar level resources rents, foreign assistance levels, and membership in regional and continental unions.

7.1.1. Theoretical expectations and puzzle

⁴⁶⁸ The seminal contribution by David Keen noted that economic motivation prolong conflict (Keen 1998); it led to the research on greed and grievance and to a near categorical rejection of grievances (Collier and Hoeffler 2000). While resources are central in grievances and identities but political factors are key to understand roots and objectives (Arnson and Zartman 2005)

⁴⁶⁹ Easterly and Levine, 1997

The underlying question of the next two chapters is that given all these similarities, what is the distinct explanation for differing regulatory choices? One would expect an analogous path of agency and preference formation. Instead, Liberia did not endorse the Montreux process, whereas Sierra Leone did. This question matters for my overall research question on cooperation in private security provision, and it matters specifically for Liberia since it was the first instance of a PMSC building a sovereign nation's military and police capabilities.

I build my case studies with two theoretical expectations. The first is that a greater international influence exists than in the preceding case studies. I have described in this section the deep and the recent historical reasons for such influence.

Yet, I find a greater level than agency than expected. I discover that an array of non-state actors, from open-registries to insurance firms, shaped the on-going institutional change where Liberia has a non-negligible role. Further, Sierra Leone's regulatory experience is increasingly recognized as a source of practice in several areas.

A second theoretical expectation is that a strong anti-mercenary norm exists given the resonance of recent experiences. I anticipate the norm to be even stronger than in the preceding case studies- one of the cases where the norm has become *puritanical*, as Percy writes. I find indeed that the norm has an influence for example in the long and complex reaction to the use armed guards on board ships through an institutionalized resistance similar to what I illustrated in chapter two. The anti-mercenary norm however cannot entirely explain differences in regulatory choices between Liberia and Sierra Leone.

7.2 PMSCs building the army of Liberia

Liberia sustained a 14-year civil war that ended in 2003. Of a population of approximately 3 million, an estimated 270,000 Liberians were killed and hundreds of thousands were displaced, infrastructure had crumbled, unemployment rate hit 85 per cent. The United Nations Mission in Liberia (UNMIL), the largest peacekeeping mission in the United Nations history, maintained the fragile peace. In that context, the lengthy and complicated process of reconstruction rested on American shoulders. Stephen Ellis once said that an American NGO founded Liberia⁴⁷⁰ and the history of U.S. involvement bred what Amos Sawyer called an unhealthy psychology of dependence. How did it happen, though, that an American PMSC raised the new army of Liberia, as McFate put it⁴⁷¹? More importantly for this research, what does it mean that the only country whose army is built by a PMSC, does not endorse the Montreux process?

7.2.1 Argument for External Influence

There are two plausible explanations for Liberia's state choices, I argue. First, the precariousness of the State, after a long and debilitating war, and the second is the external influence of the United States. These explanations, which I develop below, are not mutually exclusive, nor do they discount for a role of contingency.

Let us proceed with order and examine the state weakness hypothesis first. After fifteen years of civil war, the Liberian state was in ruin. In the midst of the post-conflict process, the main

⁴⁷⁰ He referred to the American Colonization Society. Liberia was the political creation of a community that retraced the notorious Middle Passage across the Atlantic people to the west coast of Africa and created the new republic in 1847. (p.116-7)

⁴⁷¹ McFate, 2014, ch. 10

priority was reconciliation, disarmament and demobilization. The justice system was under total overhaul. Ninety-five percent of the prison population was pre-trial.⁴⁷² In 2007, according to a RAND report, the principal concern was the inadequate oversight of security forces, and it recommended a focus on courts and prisons, rather than the oversight of private security companies.⁴⁷³ The report briefly concludes, however, that in the future, it would be important to accredit and monitor private security companies. However, the clear priority was how to address reconciliation and as Amos Saywer wrote, democratic governance cannot be implemented without peace and security.

Alternatively, in an instance of *second image reversed*, the formation of interests and preferences could have been largely bounded by influence and events taking place in international politics. The external influence of the U.S. on the DDR process is in fact presumed by much of the literature.

Since the Peace Agreement of 2005, the U.S. had the lead role in restructuring the Army of Liberia. The U.S. State Department provided support for recruiting and training about 2,100 soldiers. In addition, it hired two PMSCs to help the Government of Liberia in its reform process: DynCorp International provided facilities and training for the Army of Liberia, and Pacific Architects and Engineers built military bases and provided advanced training and mentoring to Liberian Army officers. According to DCAF, this created a direct line between contractor and the US Government⁴⁷⁴, a point reiterated by Gumedze when analyzing the

⁴⁷² International Crisis Group, "Liberia: Resurrecting the Justice System," *Africa Report*, no. 107, April 6, 2006, 18.

⁴⁷³ "Cf. Mehler: "a security sector review was conducted by the RAND Corporation. This report was seen as the basis for a national dialogue on security-sector reform." Mehler, Andreas, "Why Security Forces Do Not Deliver Security Evidence from Liberia and the Central African Republic." *Armed Forces & Society*, 2012, 38 (1). The Rand report is available at: http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG529.pdf

⁴⁷⁴ *The process was de-linked from parallel efforts to reform the national police so coherence across the security sector was an issue. And finally, the lines of accountability for this work ran between the contractor and the US Government. National ownership of security reforms was undermined by the failure to provide accountability to the nascent Liberian executive, parliament or civil society.* In *PMSC Regulation: The Way Forward* by Alan Bryden. 35th Round Table on Current Issues of

relation between Liberia and the United Nations- the involvement of U.S. PMSCs pointed to a lack of democratic accountability⁴⁷⁵.

One could presume that the decision not to endorse Montreux lied somewhere within this *direct line* between contractor and the US Government. This point poses a fundamental question in Liberia's security sector reconstruction process- and SSR processes in general- that is whether private contractors can build democratic institutions responsive to civilian oversight and in an atmosphere of at least partial secrecy⁴⁷⁶, a point also made by Bryden:

*The reform model initially proposed for the army was not grounded in Liberian realities, values and priorities. The process was de-linked from parallel efforts to reform the national police so coherence across the security sector was an issue. And finally, the lines of accountability for this work ran between the contractor and the US Government. National ownership of security reforms was undermined by the failure to provide accountability to the nascent Liberian executive, parliament or civil society.*⁴⁷⁷

International Humanitarian Law. Sanremo, 6-8 September 2012. Available at:
<http://www.iihl.org/iihl/Documents/Bryden%20San%20Remo%20remarks1.pdf>

⁴⁷⁵ "Dyncorps sees itself as an extension of the US interests; it is neither responsible to the United Nations nor to Liberia" Panel Event on the Use of private military and security companies by the United Nations at the UN Working Group on Mercenaries, 31st July 2013.

⁴⁷⁶Cf.

<http://www.crisisgroup.org/~media/Files/africa/westafrica/liberia/Liberia%20Uneven%20Progress%20in%20Security%20Sector%20Reform.pdf>

It adds that: For three years, Crisis Group has attempted to gain access to the contract defining DynCorp's work in Liberia. Four people who have read it have indicated in interviews that the description of the work is approximately three pages but vague.

Another question surrounding State Department contracting of PMCs is the use of indefinite delivery, indefinite quantity (IDIQ) contracts. These contracts, opened for bidding once every five years, gave DynCorp and PAE monopolies for all peacekeeping related work in Africa.

⁴⁷⁷ *PMSC Regulation: The Way Forward* by Alan Bryden. 35th Round Table on Current Issues of International Humanitarian Law. Sanremo, 6-8 September 2012. Available at: <http://www.iihl.org/iihl/Documents/Bryden%20San%20Remo%20remarks1.pdf>, Accessed October 2nd 2013

Gumedze reiterated the same point when analyzing the relation between Liberia and the United Nations: “Dyncorps sees itself as an extension of the US interests; it is not responsible to the United Nations nor to Liberia.”⁴⁷⁸ A Crisis Group report adds that:

If the day-to-day practices of PMC contracting contradict their given raison d'être can there be another explanation for them? One, already given, is that U.S. government involvement in undertakings like Liberian SSR might never happen if the contractor option did not offer a kind of “openly clandestine” approach to doing diplomatic and military work overseas⁴⁷⁹.

Thus, it is hard to discard that the decision not to endorse Montreux may have taken place somewhere in the continuum between contractor and the US Government. Yet, one could not discard contingency. The policy choice of privatizing the reconstruction of the army of Liberia has been described as *fortuitous* by Sean McFate who personally led the work of Dyncorps. McFate writes that:

The government considered four options for who should conduct implementation: the U.S. military alone, the U.S. military with light contractor involvement, a contractor with light U.S. military involvement, or a contractor alone. They would let a second SSR assessment trip combined with budget considerations decide the matter. (...) Following the assessment mission, the DoD quickly concluded it could not conduct the SSR program due to resource constraints and ongoing operations in Iraq and Afghanistan. Consequently, the DoS was left with a Hobson's choice: Either outsource

⁴⁷⁸ Panel Event on the Use of private military and security companies by the United Nations at the UN Working Group on Mercenaries, 31st July 2013.

⁴⁷⁹ International Crisis Group (ICG). *Liberia: Uneven Progress in Security Sector Reform, Africa Report N°148*, 13 January 2009. Available at: <http://www.crisisgroup.org/~media/Files/africa/westafrica/liberia/Liberia%20Uneven%20Progress%20in%20Security%20Sector%20Reform.pdf>. p. 35. Accessed 22 January 2012

*the entire DDR and SSR program to the private sector or have no program for the AFL. The DoS chose the former and made history without meaning to.*⁴⁸⁰

7.3 Liberia and Montreux

Given the history of U.S. involvement it is not surprising to find U.S. influence on policy choices. However, there is an exceptional and contradictory element in the fact that the only country whose army is built by a PMSC does not endorse the Montreux process. It is conceivable that the U.S. Government did not originally intend to outsource the building of Liberia's military *and* that contingency drove policy. Some may argue that the non-endorsement of Montreux lies in a simpler explanation- there was no capacity to write or endorse international laws. However, Liberia has quickly complied to all pertinent conventions; she is not only a signatory of both the Geneva conventions and the anti-mercenary convention⁴⁸¹, more recently she signed the Arms Trade Treaty. Even more problematic for such an argument is the fact that Liberia did implement guidance for PMSCs at sea, thereby authorizing and legitimating private contractors at sea- a point to which I turn below.

The implication of this part of the research is important. The security sector is still poorly regulated and the endorsement of the Montreux Document could have constructive consequences. In Liberia, security firms have mushroomed⁴⁸² and developments in the

⁴⁸⁰ McFate, S. (2013).

⁴⁸¹ Signed on September 16, 2005

⁴⁸² From protection services to diplomatic missions or industries, such as rubber plantations and logging companies. Only the Plant Protection Departments (PPDs) of the rubber plantations run by Firestone, the Liberian Agriculture Company, and Cavalla employed a total of 738. Cecil Griffiths, *Mapping Study on Gender and Security Sector Reform Actors and Activities in Liberia*, ed. Anike Doherty and Aiko Holvikivi (Geneva: DCAF, 2011).

resource sector are going to strengthen this trend⁴⁸³ in an already problematic nexus of public and private family ties and companies⁴⁸⁴.

7.4 Liberian entity as policy entrepreneur

In the case of the use and regulation of armed guards on board ships, I argue that the policy entrepreneurs were the *open registries*⁴⁸⁵ and the insurance firms who bore the costs of the enduring failure to suppress piracy.

I proceed as follows: I first give a cursory introduction on the rise of Somali piracy; then I study the open registry ships because they were the first to be targeted and then show how the Liberian registry created the first guidelines for the use of armed guards on board ships and led the coalition for change that led to the new IMO policy on armed guards, which I describe in the last section.

7.4.1 Piracy in the Horn of Africa

Historically, no area has been entirely immune from maritime piracy but around the Horn of Africa, piracy created alarm and attention, as well as an abundant literature that explored the strategies for high-seas suppression, the practices of naval operation patrolling the waters off the coast of Somalia⁴⁸⁶; the morality of paying ransoms to the human rights violation of arresting pirates⁴⁸⁷; the on-shore consequences of piracy and military response to the first-hand

⁴⁸³ All Africa, 9 January 2013, Liberia: Firm Begins Estimated 840 Million Barrels Oil Drill, available at: <http://allafrica.com/stories/201301090364.html>,

⁴⁸⁴ Time magazine reported that the president tapped his stepson to run the NSA and his colleague, Samukie, to head the Ministry of Defense. They already owned a security firm called EXSECON <http://content.time.com/time/world/article/0,8599,2028194,00.html>

⁴⁸⁵ An *Open Registry* is an organization that registers ships owned by foreign entities. See the next section for definition and context

⁴⁸⁶ Murphy 2007, Berg 2009, Germond and Smith 2009, Alderwick and Geigerich 2010 in Gilmer, Brittany. *Political Geographies of Piracy: Constructing Threats and Containing Bodies in Somalia*. Palgrave Macmillan, 2014.

⁴⁸⁷ Legal research on the problem of ransom (Rapp 2010 and Rutowski et al. 2010); on the human rights violations (Guilfoyle 2010)

accounts of piracy operations or kidnappings.⁴⁸⁸ Several authors emphasized the economic explanation that leads Somali fishermen to piracy⁴⁸⁹.

For my research, three features have been particularly salient: the lingering status Somalia's as a failed State and its inability to patrol its own waters, the failure of the interstate naval response, the coincidence between the increase in piracy and the 2008 economic crisis. First, one should start with the origin of piracy, which lies in the failure of the state.⁴⁹⁰ The increase of pirate activity in the Horn, as Peter Pham writes, *has taken place since the mid-1990s (and) has a direct correlation with the disappearance of anything even remotely resembling a functioning central government in Somalia.*⁴⁹¹

When in 2008, the number of attacks rose from twenty to over a hundred a year, the international community considered a naval response. The pirates involved militias and warlords and numbered over 2000 with seven syndicates; their equipment became more advanced- with mother ships and fast 'skiffs'. Their range extended. The yearly cost rose to \$7 to \$12 billion⁴⁹². Thus, the policy response was the creation of a naval corridor to protect merchant shipping and prevent piracy. The UN adopted a series of resolution at the Security Council in 2008 and a naval operation was launched. By 2011, however, piracy kept increasing,

⁴⁸⁸ Burnett 2002; Philipps 2010; Bahadur 2011; Buchanan 2013

⁴⁸⁹ Marchal, Roland. "Somali piracy: The local contexts of an international obsession." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2.1 (2011): 31-50. Samatar, Abdi Ismail, Mark Lindberg, and Basil Mahayni. "The Dialectics of Piracy in Somalia: the rich versus the poor." *Third World Quarterly* 31.8 (2010): 1377-1394.

⁴⁹⁰ Cf. Menkhaus, Ken. "The crisis in Somalia: Tragedy in five acts." *African Affairs* 106.424 (2007): 357-390. Menkhaus cites political miscalculations and misjudgements on the part of Somali and external actors since 2004 but starting with the flawed creation of the Transitional National Government (TNG)

⁴⁹¹ Pham, P. in Hesse, Brian J. *Somalia: State collapse, terrorism and piracy*. Routledge, 2013. Pham writes that the first incident of piracy recorded off Somalia in modern times, the seizure of the Jeddah-bound MV Naviluck and the killing of three Filipino crew members by Somali assailants off Raas Xaafuun, the easternmost point in Africa, occurred on 12 January 1991 just as the dictatorial regime of Muhammad Siyad Barre was in its death throes.

⁴⁹² Bowden, Anna, et al. *The economic costs of maritime piracy*. One Earth Future Foundation, 2010. The authors include ransoms, insurance premiums, security Equipment, prosecutions piracy deterrent Organization, cost to regional economies (\$1.25 billion), naval forces (\$2 billion), and re-routing Ships (\$2.4 to \$3 billion). Also, cf. Bahadur, Jay. *The pirates of Somalia: Inside their hidden world*. Vintage, 2011

attacks turned to larger ships and turned more violent. A key turning point was the use of armed guards. No pirate attack has ever succeeded with armed guards on board. By 2012, approximately 40% of the 42,500 vessels that transit the Horn used armed guards.⁴⁹³ I explain this transition in the following sections.

A third point that matters to this discussion is that the spike in piracy coincided with the global economic recession and led shipping. In fact, resistance to the use of armed guards remained at several levels. Both the shipping industry and the IMO were concerned that the use of private contract armed security personnel on board ships could lead to an escalation of violence. Only when pressed with more deadly attacks and relatedly, higher insurance costs, the shipping industry agreed towards more defensive measures that include armed guards on board.

7.4.2 From the S.S. World Peace to the LISCR

The open registries are organizations that register ships owned by foreign entities and in contrast to national registries, accept ships with no connection to the state in terms of crewing or ownership. Initially, open registries were lax regulators and became known as ‘flags of convenience’.⁴⁹⁴ Regulation became more effective in the 1990s.⁴⁹⁵

Faced with an increase in piracy attacks, and with the second largest Flag State for merchant shipping in the world, Liberia was the first state to issue short guidance for *safely hiring and*

⁴⁹³ Lloyds’ list, Dec 13, 2012

⁴⁹⁴ Barrows, *Racing to the Top...at Last: The Regulation of Safety in Shipping*, in Mattli and Woods, Op. Cit. Carlisle, Rodney P. *Sovereignty for sale: the origins and evolution of the Panamanian and Liberian flags of convenience*. Naval Institute Press, 1981

⁴⁹⁵ Barrows, Op. Cit. The author uses ‘casualties at sea’ as an indicator of the effectiveness of safety regulation..

utilizing private security on the high seas in 2008. I shall start with some context to explain what are the open registries and why open registries ships were the first to be attacked. Then, I describe how Liberia became a proponent of guidelines for the use of armed guards and how these same guidelines inspired the IMO standards.

7.4.3 LISCRC and armed security on board

The Liberian fleet operates through an open registry, the *Liberian International Ship & Corporate Registry*, a corporate structure that includes a joint venture with the government of Liberia. The registries are also referred to as flags of convenience; the three main ones being Panama, Liberia and the Marshall Islands. From the first ship, the S.S. World Peace, the Liberian open registry flags, including oil platforms and rigs, have now become 3900.⁴⁹⁶

The registry, originally created after World War II, is located in Vienna, VA, United States. It has the responsibility to enforce Liberian laws and treaties, inspect Liberian-flagged ships and make recommendation to Liberian state. Two diplomats, are permanently based at the Registry, liaise with the Bureau of Maritime Affairs in Monrovia and the Liberian government.⁴⁹⁷

The LISCRC started to consider the possibility of private security on-board only as threat increased. Their ships were the first preys of pirates. Palmer writes that the piracy gangs

⁴⁹⁶ <https://www.liscr.com/liscr/AboutUs/AboutLiberianRegistry/tabid/206/Default.aspx> , accessed October 15, 2015

⁴⁹⁷ Author's interviews, Vienna, VA. March 2015

employed spies at various ports to pass along information on prospective targets and open-registry ships were their primary objective.

Palmer writes of Liberian-flagged vessels thus:

*their slow speed, low freeboards and relatively small crews make them favorites with Somali pirates – their details passed, via satellite phones, from Suez, Singapore and Dubai to Eyl, or Bosaso in Puntland- their IMO number, AIS code and transit details, with the insurance value of their cargo.*⁴⁹⁸

In this context, the international community chose to support a traditional strategy: an anti-piracy naval fleet. Some states, including the U.K., the European Union and the African Union, launched ambitious maritime security strategies but could not agreed on how to reform the use of private force at sea⁴⁹⁹.

A perceived ineffectiveness of the naval response, or what Mattli and Woods call “demonstration effects” associated with perception of policy failure, created a demand for new regulatory vehicles by those who were the most affected.⁵⁰⁰ The lingering attacks on ships, notwithstanding the increased naval presence were the “demonstration effects” and the hijacking of the US-flagged Maersk Alabama in 2009 and the kidnapping of its captain, was the most vivid evidence that military deterrence may not suffice.

An added set of anti-piracy best practices was created, the *Best Management Practices to Avoid, Deter or Delay Acts of Piracy*, or *Best Management Practices* (BMP). These standards of behavior for shipping companies, captains and crew concern how to prevent a piracy attack and what to

⁴⁹⁸ p.132

⁴⁹⁹ Sloggett, D. *The anarchic sea: maritime security in the 21st century*. London:Hurst. 2013

⁵⁰⁰ Vogel, D. in Mattli and Woods. Op. Cit, Ch. 5

do in the case of an attack or hijack.⁵⁰¹ These are largely non-lethal tactics that include armed guards on board.

They were originally developed by the private sector but were endorsed by states. The shipping industry drawing on earlier versions of best practices created the BMP. Then, these were advanced by the *Contact Group on Piracy off the Coast of Somalia* as a tool kit of legal rules and procedures to regulate how piracy should be embedded in national legislation and which procedures should be used to prosecute piracy suspects. With the BMP guidelines endorsed by a state organization, the open registry companies and insurance firms became, again, leading policy entrepreneurs for change. As Bueger and Stockbruegger write that:

*The BMP as a governance technique gained further authority by the so-called New York declaration. This declaration presents a formal agreement of states to comply with the BMP. It was originally signed by four flag states (Panama, Marshall Islands, Bahamas, Liberia). Flag states have started to disseminate the BMP through education tools for crews, but also insurance companies increasingly use the BMP to blacklist non-compliant companies.*⁵⁰²

Thus, the open registries were key policy entrepreneurs responding to a confluence of vulnerability and increased assessment of financial risk.

Both the registry and the Liberian state, one of a few states to gain revenues from their status of flag of convenience⁵⁰³ risked seeing their revenues at risk. Thus, the Liberian Registry recommended a set of vetting procedures, skill sets, training, equipment, and management

⁵⁰¹ Struett, Michael J., Jon D. Carlson, and Mark T. Nance, eds. *Maritime piracy and the construction of global governance*. Routledge, 2013. They write that the UNSC provide the main official forums for addressing piracy, and that the Contact Group on Piracy off the Coast of Somalia was created on January 14, 2009, is a forum that brings together representatives of nearly 60 countries and several international organizations (including the EU, NATO, the African Union, the Arab League, and several departments and agencies of the UN).

⁵⁰² Bueger and Stockbruegger in Struett, Op.Cit., pp.112-3

⁵⁰³ Author's interviews, March 2015

support for Liberian ships contracting maritime security companies.⁵⁰⁴ In practice, the security desk produced the guidelines at the headquarters of the Liberian International Ship & Corporate Registry. It was followed by the quick endorsement of the two Liberian diplomats, the stroke of a pen by two state representatives.⁵⁰⁵ Liberia was the first flag state to make the change; the guidelines were the first laws in the field of maritime private security in 2008, i.e. the same year when the Montreux Document was signed.

The insurance firms were the other agents of change. In reaction to the growing threat and cost of ransoms, the insurance industry responded by increasing its premiums, especially in high-risk piracy zones, a more affordable insurance was provided only for securitized ships.⁵⁰⁶ In 2011, when, piracy kept increasing, and pirates turned to larger ships and became more violent, shipping industry coalesced towards more measures. Eventually, shipping industry overcame the resistance to include armed guards on board even if the International Chamber of Shipping declared that under normal circumstances private armed security is not recommended on board commercial vessels.⁵⁰⁷

The open registries, especially LISCAR, and the insurance firms, were key agents of change, supported by national governments- i.e. Liberia and the U.S.- and an international organization, the I.M.O. At the IMO, a coalition for change ~~led by the U.S. and Liberia that~~ overcame organizational reticence.

⁵⁰⁴ This document vagueness is also justified by the evolution of regulations in this area.

⁵⁰⁵ Author's interviews, Vienna, VA. March 2015

⁵⁰⁶ When the Gulf of Aden was classified as a war risk area by Lloyds Market Association (LMA) Joint War Committee in May 2008, the cost of war risk premiums increased 300 fold. (Carmola, Op.Cit.)

⁵⁰⁷ Kraska writes that One crew member was murdered when the pirates shot their way into the citadel before help could arrive. These more aggressive pirate attacks led the International Chamber of Shipping, in frustration, to issue a media release on February 15, 2011, declaring that under normal circumstances, private armed security is not recommended on board commercial vessels. But after a sailor was executed by Somali pirates during the attack on the Beluga Nomination, the ICS acknowledged that the ship operator must be open to the option of armed security to deter attacks and defend crews. 41 Only days later, the murder of 4 Americans by Somali pirates on board the sailing vessel Quest reopened the issue of armed security on board merchant shipping in the waters off the Horn of Africa. Kraska, 2011:72

7.4.4. IMO Guidelines

By 2015, after long resistance, the IMO had devised a strategy to permit armed guards on board ship as part of a number of measures to improve safety and security. However, the UN agency had long discouraged the practice. The transition occurred with the IMO *Interim guidance* adopted in 2011 and 2012, a document based on the first standards issued by the Liberian administration.

Walking a thin line, and *mutatis mutandi*, the IMO faced risks similar to ICRC in the Swiss initiative.⁵⁰⁸ Both the Montreux Document- and the ICRC itself- had to reiterate that they were not legitimating PMSCs. In the same way, the IMO did not want to be a driver of intergovernmental discussion on a topic with as contentious a history as privateering.

Thus, the IMO initially deferred to flag States as well as to ship-owners, and distanced herself both from ICoC and Montreux:

because, in the case of the Montreux Document, it applies only during "armed conflict," and in the case of the ICoC, it only identifies a set of principles and processes for private security service providers related to support for the rule of law and respect for human rights, but is written in the context of self-regulation and only for land-based security companies, and is

⁵⁰⁸ Cf. Chapter 1

*therefore not directly applicable to the peculiarities of deploying armed guards on-board merchant ships to protect against acts of piracy and armed robbery at sea*⁵⁰⁹.

Then, the IMO *Interim guidance* was adopted in 2011 and 2012. This was “just guidance; it is up to the ship operator and flag state to decide (...) The guidance on vetting just says vetting is essential; it doesn’t take a view on how or who.”⁵¹⁰ However, these were the first standards to be adopted.

They rules are based on the document issued by the Liberian administration.⁵¹¹ Private security firms must be able to provide documentary evidence on criminal background checks, history of employment, military and law enforcement background checks, certification in the use and carriage of firearms.⁵¹² Some rules are service provision considerations for ship-owners, who should consult with their insurers prior to contracting with and embarking armed guards. PMSC should provide evidence that they hold and will maintain a valid insurance. The size, composition and equipment of the proposed armed security team should be carefully discussed and agreed as necessary by the ship-owner contracting with the firm.

Further debate took place between 2012 and 2015. European states remained unenthusiastic but “from being even reluctant to discuss, administrations found themselves going down this road”⁵¹³.

⁵⁰⁹ Dubner, Barry, and Claudia Pastorius. "On the Effectiveness of Private Security Guards on Board Merchant Ships Off the Coast of Somalia--Where is the Piracy? What are the Legal Ramifications?." *North Carolina Journal of International Law and Commercial Regulation* 39.4 (2014).

⁵¹⁰ Lloyds' list, Oct 3, 2011

⁵¹¹ Author's interviews, Vienna, VA. March 2015

⁵¹² Par. 2.3, MSC 89/WP.6, Annex 3, page 4

⁵¹³ Author's Interviews, London, June 2015

The end result came in June 2015, when the IMO Maritime Safety Committee produced the *interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area* and the *Interim Recommendations for Port and Coastal States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area*.⁵¹⁴

The IMO, placed at the supranational level as the key organization that could facilitate or hinder regulatory change, discouraged armed contract security on board ships but was led to a conspicuous institutional change. From the times of the Titanic disaster of 1912- which galvanized attention toward improving safety of shipping and led to the first major treaty- and eventually to the creation of the IMO itself⁵¹⁵- her mandate expanded over the years to include other important issues, especially around maritime security.⁵¹⁶

Conclusion

In this chapter, I searched for state choices in a particularly intractable case. I argued that the decision not to endorse Montreux may have lied somewhere in the continuum between contractor and the U.S Government. In the same way as the choice of the U.S. Government to use contracting were contingent in the first place, so were choices on Montreux. This would be compatible with Avant's reflection that increased U.S. outsourcing was never intentional⁵¹⁷, and parallels the result of chapter six. Liberia reveals contingent choices- rather than

⁵¹⁴ Note that the IMO uses the term 'privately contracted armed security personnel' or PCASPs rather than PMSCs. Thus, with the International Organization for Standardization standards set to become the unique golden rule, the IMO turns to the ISO contribution to the development of "minimum standards for the shipboard deployment of armed security guards (which) will be particularly useful to flag States, and this will in turn help ship owners who urgently need practical as well as legally acceptable solutions..."

⁵¹⁵ The Safety of Life at Sea Convention (SOLAS) was created in 1914. In 1960s, the IMO became the specialized agency of the United Nations serving as the principal venue for states to develop and implement rules to ensure safe, secure, and environmentally sound shipping through- out the world

⁵¹⁶ Attard 2014.

⁵¹⁷ during the Iraq War. Avant 2012? check

preferences- for regulatory cooperation on private security provision. Unlike South Africa and Sierra Leone, Liberia's choices were not prior to specific interstate political interactions, i.e. Montreux. Thus, they were not causally independent of the strategies of other actors.⁵¹⁸

Secondly, I explained choices in the context of how an array of state and non-state actors, from open registries to insurance firms contributed to the premises for a *de facto* form of governance. The process is vast and while I do not claim to articulate all the components, I offer a narrative where the agency of states can be found. In the filigree of events, the contested process seems dominated by private authority but a role for states can be recovered at key stages.

⁵¹⁸ Cf. Introduction. 'Liberal theory focuses on the consequences for state behavior of shifts in fundamental preferences

CHAPTER 8

SIERRA LEONE: CONTINUITY AND CHANGE

This chapter examines how the national legislation of post-conflict Sierra Leone became a source of practice for PMSC governance. Second, the Ebola epidemic has created the conditions to study continuity and change in standards in PMSC in a *territorial* state during a post-disaster setting. I study state choices in a post-conflict context and find that the anti-mercenary norm turns out to be relatively less influential on rulers and policy-makers than expected. I study the context of the recent Ebola Virus Disease (EVD) epidemic in Sierra Leone and the governmental response. I emphasize in particular the overall control retained by the state during the implementation of emergency measures.

8.1 A source of practice

In 1991 the rebels of the Revolutionary United Front (RUF) invaded Sierra Leone from Liberia. The war that ensued included a number of factions, a collection of militias, the Economic Community of West African States (ECOMOG), a largely Nigerian peace-keeping force, and military outfits, like the British firm Gurkha Security Guards, the South African Executive Outcomes, and the British Sandline. EO was hired to provide short-term stability and training to the government forces; Sandline was used to obtain arms supply to support

ECOMOG actions. The story of private security in Sierra Leone is captured in several perceptive accounts⁵¹⁹ but the danger of the symbolic association with the degradation of Sierra Leonean politics is shown in *Corruption and State Politics in Sierra Leone* where Will Reno introduced the notion of ‘shadow state’.⁵²⁰ Reno also revitalized the notion “warlord politics,” where private interests of the ruler and the collective interest of the state are fused and where politics is not based on elite accommodation, but rather on support and resources from highly mobile businessmen and commercial partners.⁵²¹

In short, Executive Outcomes (EO) was hired to provide short-term stability to the government but became deeply involved in the political arena by way of training the Kamajors, an ethnic group that rose in power as a result of this external support, and paving the way for elections in 1996. Executive Outcomes created a parallel force and contributed to fragmenting the political system.⁵²²

Later, when the multi-national effort led by ECOMOG forces failed to recapture the capital, the exiled president Kabbah turned to another firm, Sandline International. Sandline’s contract was to train and equip 40,000 Kamajors, to coordinate the recapture of Freetown, and to provide arms and logistics for the assault coalition. *The Sandline intervention, however, came to a halt when the firm’s shipment of arms was declared in contravention of the UN arms embargo and was impounded by Nigerian forces at Lungi.*⁵²³ The Arms to Africa scandal erupted when the British investigation began both around Sandline and a Canadian mining company, Diamond Works. The parliamentary inquiry tried to establish if the firms were in breach of a UN arms embargo and

⁵¹⁹ Spicer, Tim. *An Unorthodox Soldier: Peace and War and the Sandline Affair: an Autobiography*. Mainstream Publishing Company, 1999. Kinsey, Christopher. *Corporate soldiers and international security: The rise of private military companies*. Routledge, 2006, ch. 4

⁵²⁰ For a recent bibliography, cf. Harris, Op. Cit., p.4

⁵²¹ Chinese warlords at the beginning of the twentieth century, who first invented the term to describe themselves. Pye, Lucian W. *Warlord politics: Conflict and coalition in the modernization of Republican China*. Praeger Publishers, 1971

⁵²² Reno (Ibid., 1998: 138)

⁵²³ *Abrahamsen, Rita; Michael C. Williams (2011-01-01). Security Beyond the State (pp. 154-155). Cambridge University Press. Kindle Edition.*

concluded with a report that that arms had been shipped against the UN sanctions which the UK had proposed⁵²⁴.

The experience of EO and Sandline led the Sierra Leonean State to approve the National Security and Intelligence Act of 2002, which was particularly attentive to the regulation of the private security and required companies in Sierra Leone to register with the Office of National Security.

Ralby writes that:

the Standard Operating Manual for Private Security Companies in Sierra Leone (SOP) took effect in January 2006, setting forth numerous requirements for obtaining a license from ONS and establishing what standards must be maintained in the operation of private security businesses. The SOP provides the legal standards by which licensed PSCs must abide, covering everything from minimum wages and gender discrimination, to uniforms and sick leave.

This experience in regulation allowed Sierra Leone to contribute to the preparatory works for the Montreux process.⁵²⁵ The experience of EO and Sandline led the State to approve the National Security and Intelligence Act of 2002, and eventually the Montreux Document, with state choices taking place in the background of a lessened influence of the anti-mercenary norm on policy-makers⁵²⁶.

⁵²⁴ The Legg Report. Cf. D. Harris, *Sierra Leone: A Political History*, Oxford University Press, 2014. On the significance of the Arms to Africa affairs, cf. Kinsey 2006: 90-93. The Arms to Africa affair and subsequently the United Kingdom Green Paper of 2002 were a turning point in the perception of the legal nature of PMSCs. As Kinsey writes, it would have been a simple matter of procedure to outlaw PMSCs but “there occurred a shift in the perceived legality of the activities” of PMSCs.

⁵²⁵ Cockayne writes that: “in the summer of 2007, IPI, DCAF and the ICRC drafted detailed discussion papers, totaling over 100 pages, drawing together existing practice—of states, private clients and industry associations (...) the most important sources of practice were: national legislation in the United States, UK, South Africa, Iraq, Afghanistan, Angola, Sierra Leone.” Cockayne, *Op. Cit.*

⁵²⁶ Cf. Christensen, Maya Mynster. “The Underbelly of Global Security: Sierra Leonean Ex-militias in Iraq.” *African Affairs* (2015): pp.29-30. In her interviews, she writes: ““We are not sending mercenaries to Iraq and Afghanistan, if this is what you think,” an employee at the Ministry of Labour told me a few weeks after it was announced that Sabre International would be recruiting

Enforcement and application of Montreux Document oversight were not sufficient, as documented by Christensen the abuses on Sierra Leonean contractors, which included discrimination and deportation⁵²⁷. The abuses on Sierra Leonean contractors fall into the category of TCN described in chapter five, with responsibilities for both territorial and contracting states. These abuses have failed to stir the anti-mercenary norm, which could be due to several factors: first, the lack of fitting political entrepreneurs and electoral politics, as in the case of South Africa; second, and most importantly, due to the extraordinary nature of the Ebola epidemic since 2014.

8.2 Maritime Security in Sierra Leone

There is another area where the Mano River country is a source of practice- the modern use of PMSC in a coast guard capacity originated in Sierra Leone.⁵²⁸ When Executive Outcomes was hired for land operations in 1995, insecurity at sea also spread from the use of stolen speedboats by rebels attacking the local commercial traffic in the coastal waters. Additionally, a fleet of international trawlers had begun operating without permission denying the government of important revenue. The turn to private security, in the form of a sea platform, was proposed to the client government but rejected.

'ex- servicemen' for security contracting. (...) he stressed that this was a programme launched (...)to tackle the huge youth unemployment problem".

⁵²⁷ Cf. Christensen, Maya Mynster. "The Underbelly of Global Security: Sierra Leonean Ex-militias in Iraq." *African Affairs* (2015): pp.29-30. Relying on her recent field-work, she writes: "We are not sending mercenaries to Iraq and Afghanistan, if this is what you think,' an employee at the Ministry of Labour told me a few weeks after it was announced that Sabre International would be recruiting 'ex- servicemen' for security contracting. (...), he stressed that this was a program launched (...)to tackle the huge youth unemployment problem".

⁵²⁸ What follows is based on P. Cullen in Berube and Cullen (2014) *Private Maritime Security*. Routledge. Pp. 103-110

However, a former EO employee and his company Southern Cross Security picked up the idea of private sea operations and the firm was awarded a fisheries protection program (1999-2002) after agreeing to wipe out a group of pirates in a single and successful anti-piracy operation. In this case again, one can agree with Abrahamsen and Williams that while it is an *exaggeration to say with one of our interviewees that 'the Sierra Leonean private security sector is rooted in EO', it is undoubtedly the case that the company's legacy is highly pertinent to the present situation.*⁵²⁹

In Cullen's account, Southern Cross Security operated teams of expatriate personnel and embedded Sierra Leone police personnel, on high-speed patrol boats, with heavy weapons received from the army.

According to Cullen, SCS exerted significant influence in three ways:

“It created a fisheries protection program that did not (and likely would not have) existed at the time due to limited logistical capacity. (...) SCS had essentially invented and implemented an important aspect of maritime security policy in Sierra Leonean waters. Second, the everyday operational content and practice of maritime security was designed by SCS (...). Third, SCS entrepreneurially designed a new and punitive maritime security program that changed the *target* of governance for the *purpose* of its profit-motivated agenda.”⁵³⁰

The business strategy of SCS, the author shows, shifted towards maximizing profits with exclusive emphasis on punitive enforcement mechanism, seeking short-term gains from issuance of fines and inclusive of arrests.

⁵²⁹ Abrahamsen and Williams, Op.Cit., p. 149

⁵³⁰ Cullen, Op.Cit. p.110.

8.3 Sierra Leone and the Ebola Virus Disease

Pathogens and diseases are an unseen enemy that moves populations, creates boundaries and shapes state-market relations. Dominant explanations of institutional development rely on epidemics as a key factor of change.⁵³¹ Diseases typify a very real risk- a risk unlike armed conflict or piracy but one that is reconfigured as a security risk for firms, creates a demand for security, reshapes the security market. Hence, the recent Ebola Virus Disease (EVD) epidemic that affected Western Africa offers a unique opportunity to study a key dynamic of institutional change.

I organize the discussion as follows. First, I start by outlining the motivation of the study by showing how the responsibilities of territorial states during post-disaster phase are increased. I typify the challenges of post-disaster situations in *territorial* states described by the existing literature- i.e. that private security may be co-opted by political groups, that supervision by public forces may be lessened and further, that in the case of PMSCs working under status of mission agreements, firms may be given immunities and privileges that decrease the scope for domestic oversight. Second, I move to describe the context of EVD in Sierra Leone and the governmental response. I emphasize in particular the overall control retained by the state during the implementation of emergency measures.

⁵³¹ The reference work is obviously Acemoglu, Daron, Simon Johnson, and James A. Robinson. *The colonial origins of comparative development: An empirical investigation*. No. w7771. NBER, 2000.

8.3 Sierra Leone and the Ebola pandemic

8.3.1 Typical post-disaster challenges in territorial states

The EVD epidemic was the first urbanized outbreak in history and spawned with widespread consequences in the region and across the world. In 2014-15, the epidemic resulted in unprecedented human devastation and brought new and immediate challenges to the state.

There is a gaping need to research the challenges and the relevant norms for a post-disaster situation and the EVD epidemic offered one such avenue for research. I refer to the norms that can be found in the domains of IHRL, IHL, and refugee and internally displaced person law, as well as an emerging category known as international disaster response laws, rules, and principles (IDRL).⁵³² Scholarly work has highlighted at least two broad governance problems during disaster and post-disaster times.

First, the lack of control increases the risk of private security “be[ing] co-opted by political groups and becom[ing] involved in criminal activity”.⁵³³ PMSCs may also work for gangs or criminal groups, representing an even more direct threat to security. As Perret writes:

Incidents have illustrated how the lack of regulation of PMSCs at the national level renders PMSCs a source of insecurity instead of a complement to public security. In 2010, not long after the earthquake, a PMSC employee killed a looter and was about to shoot another one when US soldiers intervened. Just a few days later, one PMSC agent accidentally shot another

⁵³² D. Fisher, ‘Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis’, 89 (866) *Int’l Rev. of the Red Cross*, (June 2007), available at http://www.icrc.org/eng/assets/files/other/irrc_866_fisher.pdf, in Perret, Op. Cit.

⁵³³ This has happened in the recent past in Haiti in particular. SSR Issue Papers. No. 1: *Security Sector Reform in Haiti One Year After the Earthquake*, Isabelle Fortin (March 2011). Burt, Geoff. *From private security to public Good: regulating the private security industry in Haiti*. Waterloo: Centre for International Governance Innovation, 2012.

during a bank looting.

Another issue that may occur in post-disaster contexts relates to the accountability of PMSCs' employees engaged in a multi-lateral mission. In this case, exercise of the host state's jurisdiction depends on the status-of-forces agreement or status of mission agreement with immunities and privileges that are meant to facilitate activities and functions of foreign agents in the country where they are accredited.

8.3.2 The EVD and the response of the state

The EVD epidemic created a mortal danger to the existence of Sierra Leone as a nation. At the time of writing, there have been 3,773 deaths and a total of 11,889 cases of Ebola in Sierra Leone.⁵³⁴ The justice system was stopped or slowed as officials stayed away. More arrests were made under emergency laws, putting pressure on Sierra Leone's already overcrowded prisons. Schools were closed for a whole year. With a history of conflict and high youth unemployment, the potential for instability has been very high.

In this context, the state remained in charge. Max Weber's widely accepted definition of the state as the organization with the "monopoly of legitimate violence" in society, is borne out in the midst of the epidemic. Without such a monopoly and the degree of centralization that it entails, the state cannot play its role as enforcer of law and order, let alone provide public services and encourage and regulate economic activity. I shall show that the emergency regulations empowered the government- at the risk of human rights violations and deteriorated democratic governance. The use of public-private assemblages remained

⁵³⁴ Ebola Situation Summary, WHO, March 27, 2015.

analogous to the pre-epidemic days, and focused on the protection of private property. Overall, it may have helped curb a problem of limited resources and personnel as the police and army protected public order.

8.3.3 Emergency Regulations, state authority and public-private assemblages

As the medical response introduced quarantine protocols to target the disease, state authorities focused on managing physical movement and social interactions, and introduced public emergency regulations. It is worth briefly describing these measures before studying the relation between state authorities and the private sector.

The State of Emergency (from now SOE) was conceived in collaboration between governmental and non-governmental experts and was first implemented in June 2014.⁵³⁵ The measures curbed personal freedom, freedom of movement and assembly and they empowered the government to arrest without a court order. An ‘Ebola czar’ was appointed within the ranks of the military and a newly established National Ebola Response Center (NERC) was given authority for the implementation of the national Ebola Response Plan and all programs pertaining to Ebola response.⁵³⁶

I shall summarize the effects of the SOE as follows. First, they dictated that the “infected or suspected to be infected” shall not leave the epicenter; the person that contravenes commits an offence and is liable to a fine or to imprisonment.⁵³⁷ Second, the SOE define limitations

⁵³⁵ Authors’ interviews, September 2015, Freetown

⁵³⁶ The office was located in town, next to the United Nations Mission for Ebola Response and the Special Court for Sierra Leone, west of the city of Freetown.

⁵³⁷ Cf. Sierra Leone Public Emergency regulations, Art. 3

<http://www.parliament.gov.sl/Portals/0/BILLS/PUBLIC%20EMERGENCY%20REGULATIONS%2020%20AUGUST%202014.pdf>
Accessed September 4, 2015

to freedom of assembly include the prohibition of public meetings and gatherings, sporting activities, the prohibition of nightclubs, cinema or video centers.⁵³⁸ Third, and most important to our purposes, they defined the role of the police and military in restricting the movement of persons and vehicles, protecting health care providers, conduct regular patrols.⁵³⁹

The SoE greatly reinforced the government without suggesting major changes in the use of public-private assemblages, let alone of the regulatory component. As Herbst writes, *the states, to a certain extent, are their boundaries*,⁵⁴⁰ and at the state borders, the public authorities rather than the public-private assemblages enforced special regulation. The state of emergency involved greater activities both for the Sierra Leone Police and for the army; 750 soldiers were dispatched to the border areas to enforce quarantine measures.⁵⁴¹

The SOE regulations also involved the local councils in making bye-laws⁵⁴²; but both in the province and in the city, private security was only used to protect private property, not to quell or suppress protests.⁵⁴³ In Freetown, the administration and oversight over private security companies even during a crisis remained in the hand of the government, and of the ONS in particular. The ONS, created in 2002, is still funded by the United Kingdom and international partners with an international advisor in the staff.⁵⁴⁴

According to the United Nations, only G4S and Acal security had their own patrols, like the police and the UN itself.⁵⁴⁵ These patrols are run with unarmed private guards working alongside an armed official from the police. Firms like G4S were particularly visible. Over they

⁵³⁸ Ibid., Art. 15-17

⁵³⁹ Ibid., Art. 5

⁵⁴⁰ Herbst, 2000, p. 263

⁵⁴¹ <http://time.com/3086145/sierra-leone-troops-ebola/>

⁵⁴² Ibid., Art. 13

⁵⁴³ Authors' interviews, September 2015, Freetown

⁵⁴⁴ Authors' interviews, September 2015, Freetown

⁵⁴⁵ Interviews, UN DSS

years, G4S acquired a number of important contracts, partly as a result of the presence of Wackenhut and the South African company Gray Security in the country prior to their takeovers by Group4 and Securicor and eventual incorporation into G4S.⁵⁴⁶ The firm educated its 1600 employees on Ebola regulation in-house and continued running their patrols during lockdowns.

This arrangement may have bolstered the security apparatus with public forces contending with limited resources and personnel. Abrahamsen and Williams write of the *consistent reduction in the size of the RSLAF, from 14,000 to 10,517 by the end of 2007*.⁵⁴⁷

However, the SoE critically reinforced the powers of the government without upsetting the balance of public-private assemblages. The symbolic power of security can paradoxically become a resource for others to challenge the monopoly of the state and to legitimate the entrance other actors- a dynamic tension identified by Abrahamsen and Williams.⁵⁴⁸ The symbolic power of the public was largely preserved during the epidemic. Nonetheless, the government became free to crack down on protest and criticism. Some journalists were arrested.⁵⁴⁹ Some of the policies adopted, such as the quarantines initially imposed on the two hardest hit districts, which were bastions of opposition support, were misconstrued as deliberate attempts to hurt their populations.⁵⁵⁰ Not surprisingly, a vigorous debate in parliament informed the choice whether to renew the SOE in August 2015.

Conclusion

⁵⁴⁶ Abrahamsen and Williams, Op.Cit., p.149

⁵⁴⁷ Abrahamsen and Williams, Op.Cit, p. 157

⁵⁴⁸ Abrahamsen and Williams, Op.Cit, p.165

⁵⁴⁹ <http://www.theguardian.com/world/2014/nov/05/ebola-journalist-arrested-over-criticism-sierra-leone-government-response>

⁵⁵⁰ World Bank, 2015

This chapter examined three inter-related aspects. First, how the conflict experience in Sierra Leone became a source of practice for PMSC governance. In the case of Sierra Leone, interest-based explanations provide insights on regulatory politics, and on enforcement and application of oversight. State choices do not reflect the influence of the anti-mercenary norm.

Second, domestic commitment to regulation remains insufficient, as documented by Christensen work on the abuses on Sierra Leonean contractors, with lingering responsibilities for both territorial and contracting states.⁵⁵¹ The cases of Sierra Leone- like South Africa, in chapter 5- point to a need for scholarly attention and advocacy towards the problem of Third Country Nationals.

Third, the Ebola epidemic has created the conditions to study continuity and change in PMSC standards during a post-disaster setting. The state retained control over PMSCs during the implementation of emergency measures. In each context, I emphasize state choices where the anti-mercenary norm is relatively less influential on policy-makers.

⁵⁵¹ Christensen, Maya Mynster. "The underbelly of global security: Sierra Leonean ex-militias in Iraq." *African Affairs* (2015): adv055.

CHAPTER 9

SYNTHESIS: IDEAS, INTERESTS & EXTERNAL INFLUENCE

9.1 Choices and preferences in regime formation

My study proceeded at both the inter-state and at the state level to disaggregate a complex and vast phenomenon.

The use of international regulatory cooperation as the dependent variable- the formal activity that goes from agenda setting to negotiation and implementation- reveals that at the global level, regime formation depends upon the continued recognition of a unique patronym for security firms. I have described the content and slow emergence of PMSCs norms, which build upon the support of states but without the binding commitments of legal agreements.

At the unit-level, how countries “choose” to exercise their agency depends upon the *prior* international choices. The emphasis on state choices and preferences was based on the assumption that preferences matter to international politics- first, and more generally, determining preferences is key to cooperation and conflict.⁵⁵² As Moravcsik writes: “Extensive

⁵⁵² Moravcsik, Op. Cit.

empirical evidence supports the (assumption that) even in “least likely” cases, where political independence and territorial integrity are at stake and military means are deployed, relative capabilities do not necessarily determine outcomes.”⁵⁵³ Secondly, and most important, variation in state preferences defines regime complexity. Alter and Meunier write that where state preferences are similar, “lawyers overcome fragmentation by crafting agreements that resolve conflicts across regimes, and thus legal ambiguity is transitory”⁵⁵⁴, but where preferences diverge, states block attempts to clarify the rules and ambiguity persists, allowing countries to select their preferred rule or interpretation.⁵⁵⁵

State preferences are not obvious because they are not directly observable. Behavior may seamlessly reflect preferences; or it may differ because of the influence of institutions, context, and uncertainty.⁵⁵⁶ Thus, Nigeria’s preferences are not directly visible but choices reveal a preference formation process.

While both capacity and aligned preferences are fundamental during the implementation phase, preferences are a basic *sine qua non* for the initial phase of norm construction.⁵⁵⁷ Probing state choices and preferences of African states, I noticed that many have been reluctant to participate in this policy debate. In general, their policymakers rarely discuss how to regulate

⁵⁵³ Moravcsik, Op. Cit. “Unless we know what these preferences are (that is, unless we know the extent to which states value the underlying stakes), we cannot assess realist or institutionalist claims linking variation in the particular means available to states (whether coercive capabilities or institutions) on interstate conflict or cooperation.”

⁵⁵⁴ The citation include a footnote: The International Law Commission has working groups and subcommittees that seek to overcome this fragmentation (fn 21, p.22)

⁵⁵⁵ Alter, Karen J., and Sophie Meunier. "The politics of international regime complexity." *Perspectives on politics* 7.01 (2009): p. 16

⁵⁵⁶ Frieden, Op. Cit.; he explains three main errors: confusing preferences and strategies; focusing on preferences and ignoring context; focusing solely on context and ignoring preferences

⁵⁵⁷ Stephanie Hofmann’s study of European Defense and Security Policy (ESDP) shows that preference divergence created significant ambiguity in the “Berlin Agreements,” which affected operations, creating delays and confusion on the ground. *Perspectives on politics* 7.01 (2009): P.16

PMSC;⁵⁵⁸ this is particularly problematic because African states are obvious 'territorial states'- states where PMSCs operate - and in the context of increased external involvement in Africa's internal conflicts.⁵⁵⁹

However, both the cases of South Africa and Nigeria imply a preference for regulation, resulting from the varying effect of the anti-mercenary norm. I find agency in large African states. Preferences of smaller states are more difficult to define. In those contexts, the effect of the anti-mercenary norm is relatively less defined. Choices may depend upon lack of capacity; external influence or contingency can play a role.

Arguments of lack of capacity often apply to the politics of implementation of signatory states.⁵⁶⁰ In analogous regulatory efforts, like the Arms Trade Treaty, there was insufficient national experience to formulate technical interventions and contributions⁵⁶¹ but this was not the case with Montreux. Sierra Leone and South Africa were co-opted specifically because of the experience and practice.

9.2 Varying Influence of the anti-mercenary norm

I have argued that the formation of choices and preferences are greatly determined and bounded by events taking place in international politics but the role of norms often stood out

⁵⁵⁸ Avant 2014, op.cit

⁵⁵⁹ Evidenced by events in Côte d'Ivoire, Mali and the Central African Republic, during which French forces intervened. More over, the increase in armed violence from around 2010, potentially reversing the gains made immediately after the collapse of the Berlin Wall, ISS Report, 2014

⁵⁶⁰ Emilie Hafner-Burton finds that during the implementation stage, opponents of human rights linkages to trade agreements have used the Vienna Convention on the Law of Treaties to strip out the human rights requirements demanded by the European Parliament.

⁵⁶¹ Lamb, Guy. "African States And the ATT Negotiations." *Arms Control Today* (2012): 15-17.

as persuasive both at the state and inter-state level. The anti-mercenary norm can be re-activated by unsolved issues in the inter-state systems like foreign enlistment. It remained institutionalized within the U.N. system.

It has a varying effect at the state-level that depends upon political entrepreneurs and contingency- such as electoral politics. In the case of South Africa, the anti-mercenary norm of post-apartheid politics was amplified by a failure to create effective domestic control over the flow of fighters to Equatorial Guinea and Iraq. I argued that the anti-mercenary norm led to the engagement- and then contestation- of Montreux.

The direction and effect on regulatory politics is not always unambiguous. In the case of Nigeria, I found a surprising result- the norm could also drive a rapprochement to Montreux. My hypothesis is that policy-makers try to escape the conventional definition that would censure contractors and are led to consider regulatory cooperation.

Further, I find that the anti-mercenary norm has no particular relevance in the study of standards for PMSCs standards in *territorial* state during a post-disaster setting.

Finally, the construction of interests, be it national interests or economic interests, are not obviously discovered- they are constructed through a process of social interaction. When states engaged with or signed the Montreux Document, or chose to begin a domestic regulatory process, I found that state preferences could be a response to a perceived *threat* to state interests or a *change* in salient economic interests.

The contracting out of security by Nigeria- prior to the rapprochement with Montreux- as explained in chapter seven, suggests a change in interests themselves. The awareness of greater vulnerability and a threat to the existence of the state arose during a key phase of democratic

consolidation. Extant literature showed that state interests favor international policy coordination particularly in the realm of anti-terrorism.⁵⁶² The case of Nigeria adds to the plausibility of this view in the African context.

Secondly, states' interests elicit state choices- rather than preference formation- in a case like Liberia. Difficulties in the construction of an explicit linkage between economic costs and interests of African states can prevent regulatory cooperation. I illustrate and contextualize with some further examples. Thirty-eight African states have maritime interests.⁵⁶³ In the area of maritime security the use- and regulation- of PMSCs is discernable in areas that impinge economic interests, from trade to fishing. Piracy affects vital trade flows;⁵⁶⁴ violent crime is a threat to fishing.⁵⁶⁵

Wherever these economic interests were defined, state choices occurred. In states like Liberia, one of a few states to hold titles and revenues from the open registry shipping, it did so exceptionally swiftly. In general, however, African states have not articulated their interests and policy formation was slow. An interest-based explanation could rely on the concept of information asymmetries as an obstacle in overcoming global market failures.⁵⁶⁶ Market actors,

⁵⁶² Katzenstein, in Goldstein, *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*

⁵⁶³ I define African states maritime interests as the economic interests of 38 states (Of the 53 African countries, 38 are either littoral states or islands. The security of their territorial water where trade, fishing, and 12.6 per cent of the world's output of oil, gas and minerals are produced. Cf. Ncube, Mthuli, and Michael Lyon Baker. "Beyond pirates and drugs: unlocking Africa's maritime potential and economic development." *African Security Review* 20, no. 1 (March 2011): 60-69. The authors note the regulatory activism that follows the recognition of the economic benefits of the maritime domain. More than 50 countries worldwide have made submissions to the United Nations to increase their maritime territory (e.g. Extensions of EEZs). (...) Ten countries in Africa have either made full or partial submissions or are working on submissions, to the UN Commission on the Limits of the Continental Shelf for such extensions of their EEZs

⁵⁶⁴ See introduction

⁵⁶⁵ The fishing sector is a major contributor to rural income and employment in most coastal countries in Africa. Attacks on fishing boats can be 20 times that of crimes involving tankers, cargo ships or passenger. Urbina, Ian, *The New York Times*, July 21, 2015. Data is from Charles N. Dragonette, who tracked seafaring attacks globally for the United States Office of Naval Intelligence.

⁵⁶⁶ Information asymmetries create problems in overcoming other market failures. Market actors, not states, feel the direct losses from crime and piracy. The losses from crime and piracy include cargo losses (e.g. petroleum products), ransom demands, theft of cash and possessions, and even damage caused to equipment and vessel infrastructure during armed attack, requiring additional time in port for repairs; further, indirect losses, such as extra day rates and fuel costs are incurred by companies diverting vessels away in an attempt to reduce risk should also be considered.

not states, feel the direct losses from crime and piracy. There is a difficulty in the construction of an unambiguous linkage of how direct and indirect economic costs and the interests of African states. Arguably, the path of state choices also depended on the fact that the Montreux seemed, at least initially, to offer no direction in anti-piracy policy. In fact, the Document was signed before the unprecedented expansion of piracy (2008-2012) that led to an increased use of PMSCs in anti-piracy tasks. Thus, states were led to take markedly different regulatory approaches.⁵⁶⁷

9.3 Tension between anti-mercenary norm and human rights norms

Two sets of norms appear to stand in tension in shaping preferences in regulatory cooperation. Democracy and human rights, on the one hand, can provide long-term prospects for PMSCs norms while a set of ideas associated to the anti-mercenary norm can be in conflict.

A recent case provides evidence on this tension. The island nation of Madagascar is a recent case where policymakers' attitudes shifted back and forth under the varying influence of the anti-mercenary norm.

⁵⁶⁷ The first approach, adopted by some States including France and Germany, consists of implementing a national licensing procedure for PMSCs verified by national authorities. Switzerland took a different approach for PMSCs that are registered in Switzerland. Authorization depends not only on criteria incorporated in national legislation but, inter alia, on membership of the ICoC Association, meaning that the private security company conforms to all principles as set out in the International Code of Conduct for Private Security Service Providers. A third approach is pursued by the United Kingdom and is based on voluntary certification to standards and membership of the ICoCA. The UK does not require companies to obtain authorization from a national authority in order to provide private maritime security services. *ICoC and Regulation of Private Maritime Security Companies*. Geneva Centre for the Democratic Control of Armed Forces (DCAF); Authors' notes from meeting held in Geneva, 4 July 2014

9.3.1 Madagascar

Madagascar is a context where the expectation of influence of the anti-mercenary norm is based on a history of mercenary coups in neighboring states.⁵⁶⁸ Policymakers' attitudes are partly dependent upon anti-mercenary feelings associated with a worldview born during decolonization.

At the same time, Madagascar has a developed commercial security sector with 50 PMSCs and over 30 in the capital. Firms like G4S employ as many as 2,500 people.⁵⁶⁹ As such, the country was invited to participate to the Montreux regional conference for francophone Africa. Following the consultations, the representative of Madagascar agreed to bring up the endorsement of Montreux in front of the legislature. Yet, when parliament came to discuss the Document, confusion arose between PMSC and mercenaries. It was argued that the endorsement might negatively affect laws on mercenaries.⁵⁷⁰

The belief that the laws on PMSCs may affect the laws on mercenaries, however, was solely based on deep-rooted perception; no recent empirical observation contributed to form such an opinion. The anti-mercenary norm led to the refusal of specific criteria to distinguish PMSCs and create legal clarity conflict with an array of inherited emotions and loyalties.

⁵⁶⁸ While Madagascar never recorded cases of mercenaries, neighboring states did- the Comoros and Seychelles have suffered from threats of mercenaries. Mercenaries have assisted three coup attempts in Seychelles (1979, 1981 and 1986). The Comoros has suffered from several coups (1978, 1989 and 1995) and coup attempts (1981, 1983, 1987 and 1990) which all involved mercenaries. Moreover a mercenary leader, Colonel Robert Denard, influenced politics in Comoros for a decade. Phillip M. Allen, *Security and Nationalism in the Indian Ocean*, Westview Press, Boulder, 1987. Malyn Newitt, *The Comoro Islands: Struggle Against Dependency in the Indian Ocean*, Westview Press, Boulder, 1984

⁵⁶⁹ Dakar regional conference on the Montreux Document, conference proceedings, report available at: <http://www.dcaf.ch/Project/The-Montreux-Document> , accessed July 17, 2015

⁵⁷⁰ Author's interviews, February 2015

The anti-mercenary norm was overcome following a round table held in the capital to present the Montreux Document to the Malagasy authorities. It led to Madagascar becoming the 53rd country to lend its support to the Document.⁵⁷¹ The Prime Minister underlined his country's support for the Document by stressing the importance for Madagascar of human rights and international humanitarian law.

This example adds a recent story of how the trajectories of choices also depend upon the tensions between rival sets of ideas. The power of principled ideas, as Sikkink called it, in the form of democracy and human rights, may provide long-term prospects for PMSCs norms. In this sense, the Prime Minister of Madagascar hinted at this characterization when he stressed the importance of human rights for his country.

PMSCs norms can build legitimacy in the context of a gradual democratization and conditional to an increased recognition of the legitimacy of the defined patronym and issue-area, described in the introduction and in Part I. Huntington's Third Wave of democratization introduced unprecedented pressure for observance of basic human rights;⁵⁷² and Crawford Young cautiously argued that African states have become increasingly politically pluralised, and democratic.⁵⁷³ In this sense, Montreux Document and the ICoC are built upon an acknowledged high human rights tradition.⁵⁷⁴ Legal scholarship posited that human rights

⁵⁷¹ <https://www.icrc.org/en/document/international-humanitarian-law-madagascar-supports-montreux-document> , accessed August 20, 2015

⁵⁷² Harbeson, John Willis, and Donald S. Rothchild, eds. *Africa in world politics: reforming political order*. Westview Press, 2012.

⁵⁷³ Young, C. (2012: 222–224). Young contends that for most African countries this opening up has signified a move 'away from authoritarianism rather than to full democracy', the introduction of more regular elections and freer civil societies than has previously been the case on the continent

⁵⁷⁴ Cf. Chap. 1 and 4

courts nested in “regional-level mechanisms represent a promising intermediate ground between the international and national levels . . . for responding to transnational challenges such as the privatization of security.”⁵⁷⁵ In this sense, Perret argued that:

*The African Commission on Human and Peoples’ Rights has dealt with the duty to prevent violations of human rights, including those perpetrated by non-state actors: “An act by a private individual can generate responsibility of the state because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”*⁵⁷⁶

It should be noted that the force of human rights led to the creation of the Voluntary Principles on Security and Human Rights- an initiative that gathered momentum after abuses occurred in Colombia and in Nigeria. The underlying principles have become a baseline standard defining how companies in the extractive industries and other sectors should deal with the human rights risks posed by their security arrangements. The international financial institutions embraced the application of the Voluntary Principles,⁵⁷⁷ particularly in the context of resource extraction in Africa.⁵⁷⁸ The security provisions in IFC Performance Standard 4 are adapted from the Voluntary Principles.⁵⁷⁹

9.3.2. Challenges to this approach

⁵⁷⁵ Perret, Op. Cit.

⁵⁷⁶ Thus, a state’s failure to exercise due diligence to prevent human rights violations—even those committed by private actors—gives rise to state responsibility. However, the due diligence obligations are circumscribed by a qualification that states must only act with the means “at [their] disposal.” The AComHPR elaborated three principles to define these limitations

⁵⁷⁷ The belief in the VPs was shaped by a previous controversy. The Voluntary Principles can provide an essential bridge across the current disconnect between the treatment of conflict as an insurable risk, and the potential for a project to influence the dynamics of conflict in a way that might cause harm to local communities. World Bank Office of the Compliance Advisor/Ombudsman (CAO), CAO Audit of MIGA’s Due Diligence of the Dikulushi Copper-Silver Mining Project, November 2005. Available at: http://www.cao-ombudsman.org/cases/case_detail.aspx?id=94

⁵⁷⁸ On how the credibility risks for IFI in extractive oil and mining is at stake when investing or lending in the Extractive Industries, Cf. Abadie, Delphine. “Canada and the geopolitics of mining interests: a case study of the Democratic Republic of Congo.” *Review of African Political Economy* 38.128 (2011): 289-302. Bray, John, and Antony Crockett. “Responsible risk-taking in conflict-affected countries: the need for due diligence and the importance of collective approaches.” *International Review of the Red Cross* 94.887 (2012): 1069-1087.

⁵⁷⁹ Author’s interviews with the founders of the V.P., Washington, DC

There are challenges to the argument that democracy and human rights norms can influence PMSC governance process. The most obvious, perhaps, is that sixty-nine countries in the world are currently considered to be non-democratic, despite the fact that all but twelve have held national elections in the past fifteen years.⁵⁸⁰ Most importantly, the characterization of norms that underlines scholarship is not unambiguous. Issa Shivji, in *The Concept of Human Rights in Africa*, argues that human rights are flexible, ambiguous, and often contradictory. They can be drawn on to construct a wide array of different discourses that, by emphasizing different rights and agents for the fulfillment of those rights, can mobilize, legitimate, or constitute radically different modes of political practice. Buidling upon Shivji's work, Adam Branch raised the important point that emancipatory discourses of human rights can serve to help "mobilize and legitimate political action to contest forms of domination that may themselves use the language of human rights".⁵⁸¹

The second limit is that the guidance provided by human rights ideals has fallen short of shaping state choices where it matters the most- the endorsements of the Voluntary Principles by African states remained on paper;⁵⁸² and a risk-based conceptualization of human rights holds within International Financial Institutions. While a plurality of opinion exists, the experts I interviewed recommend that programs fit the *local* conditions first while still meeting

⁵⁸⁰ Susan D. Hyde and Nikolay Marinov. Which elections can be lost? *Political Analysis*, 20(2):191–201, 2012. Freedom House. Freedom in the World. Technical report, Freedom House, 2015.

⁵⁸¹ Branch 2011, Op. Cit.

⁵⁸² Author's interviews, Swiss Foreign Department representative, Washington, DC; February 2014. No African country participated with only one exception, Ghana, and as of 2015, key countries like DRC and Nigeria were engaged multiple times without success. A Nigerian representative was present at the VP Plenary in March 2014 and a Nigerian NGO is in the process of applying to membership. Author's interviews, VP representatives, Washington, DC; May-June 2015

international norms. They share a concern for the proliferation of standards.⁵⁸³ One claims that:

*The ICoC is a useful beginning . . . but is so broad and general that almost any organization can qualify. In fairness, none of the other codes, guidelines or “standards” involved the security industry in formulating their recommendations, which was a major error . . . I cannot comment on the ISO standard.*⁵⁸⁴

Last but not least, a third problem is the gap that remains in the literature on the nexus between PMSCs and democratization. Abrahamsen and Williams provide anecdotal evidence to suggest that private security can distort electoral dynamics within emerging democracies.⁵⁸⁵

On the one hand, PMSCs can act as tools for democratization. Kinsey writes that PMSCs have acted as “proxies for the US government determined to strengthen the democratic process, but fearing the political consequence if something went wrong.”⁵⁸⁶ The increased use of PMSCs as foreign proxy is also supported by recent quantitative data.⁵⁸⁷ In this line, however, the interpretation of Musah and Fayemi, who had framed the problem as one of “mortal danger to democracy,” before the reformulation of the anti-mercenary norm,⁵⁸⁸ has become anachronistic.

On the other hand, the academic debate is divided; explaining patterns is difficult with a certain

⁵⁸³ Cf. Chap. 4

⁵⁸⁴ Email exchange, C.M.

⁵⁸⁵ The case of the elections in Sierra Leone in September 2007 is related in Maya M. Christensen and Mats Utas, ‘Mercenaries of Democracy: The “Politricks” of Remobilized Combatants in the 2007 General Elections, Sierra Leone’, *African Affairs*, 107; cited in in Abrahamsen and Williams (Op. Cit., p. 171). Better known, perhaps is the case of South Africa also cited in Abrahamsen and Williams (Op. Cit., p.178); the private security sector went from being seen as a defender of the social order to being viewed as an obstacle, or even a potential threat, to South Africa’s fledgling democracy.

⁵⁸⁶ Kinsey concludes by claiming that *functionalism should determine their role and not market forces if they are to make a real contribution to the network of actors that make up strategic complexes*.

⁵⁸⁷ Branovic 2011. According to statistical survey PMSCs are more and more used as foreign policy proxies in weak and failing countries

⁵⁸⁸ Musah and Fayemi, p.26. It emanated from a campaign coordinated by the Center for Democracy and Development that referred only to mercenaries

level of circularity. Arguments directly or indirectly related to Avant's hypothesis that weak states have the most to gain (or the least to lose) from privatization, but are the least able to manage private forces for the public good – efforts to harness the private sector for state building in weak states are often desperate gambles.⁵⁸⁹ These arguments rely on the logic of economic institutionalism and expect the private delivery of sovereign services to erode functional control and change in political control⁵⁹⁰.

Scholars are divided between cautious and optimistic approaches.⁵⁹¹ Carmola writes of “the ability of PMSCs . . . to pursue policies that are beyond the reach of democratic control.”⁵⁹² Mandel reflects the laissez-faire argument that “privatization of security may enhance citizen awareness of potential abuses, and this would certainly help the functioning of democracy.”⁵⁹³

The problem is particularly intractable where democratization faces significant electoral violence- in sub-Saharan Africa, for example, one in five elections since 1990 have been afflicted by violence, mostly perpetrated by ruling parties.⁵⁹⁴ As I have argued at several steps in this dissertation, the use of PMSC as an inherited patronym must become an accepted and diffuse practice in international politics. Only then, the gaping need to understand the nexus between PMSCs and democratization could then be filled. It is at this juncture that China's choices could be either procrustean or symbolic.

⁵⁸⁹ Avant 2005. Also cf. Avant 2006: 508: *market options also offer transitional or immature states short-lived increases in capacity, but the use of these options often reinforces patterns that frustrate the creation of legitimate and capable state institutions.* The conceptualization of weak states belong to Migdal. Migdal, Joel S. *Strong societies and weak states: state-society relations and state capabilities in the Third World.* Princeton University Press, 1988.

⁵⁹⁰ Avant relies on Williamson: “replication of a public bureau by a private firm, with or without the support of regulation is impossible”, “Public and Private Bureaucracies”, p.311, in Avant 2005:49

⁵⁹¹ Cautious (Musah and Fayemi 1999; Avant and Sigelman 2010; Percy 2011; Carmola 2010); Uneven (Avant 2005, Singer 2003, Kinsey 2007) Optimistic (Mandel 2006; Shearer 1989)

⁵⁹² any attempt to establish some kind of reasonable command and control seems insincere and half-hearted. Sometimes the right hand wants to allow the left hand to get away with certain behaviors even as it scrambles for the image of doing the right thing. Carmola, Op.Cit. (p. 139).

⁵⁹³ *some form of coercive protection is often necessary to make sure that popular elections and governmental checks and balances work properly and private security could at least create the possibility that this transition would be a peaceful one* (Mandel, 2006:45)

⁵⁹⁴ Scott Straus and Charlie Taylor. Democratization and Electoral Violence in Sub-Saharan Africa, 1990-2007. APSA 2009 Toronto Meeting Paper, 2012

9.4 Challenge to PMSC norms? The Chinese Perspective

In this section, I return to the role of China and her influence, as chief signatory of Montreux and major player in the African continent.⁵⁹⁵ In African studies, it is suggested that hegemony accurately describes external actors influence but at the same time, no single actor, let alone the US- nor China- does control political outcomes in Africa.⁵⁹⁶ Having already examined the role of the United States in Montreux in chapter one and their influence on Liberia in chapter seven, I offer here elements of comparison in their influence on states' choices.

China has become the largest investor, trader, buyer and aid donor for an increasing number of African countries. In a drive for resources, China also has a distinct developmental model, which their strategists believe has valuable lessons for Africa. Thus, the development of a Chinese practice in the governance of security matters a great deal. If African states are viewed as naturally seeking to preserve their sovereignty while the objective of the outsider is just to establish dominance⁵⁹⁷, how do African states cooperate with China's state capitalism private security overseas? Is China's regulatory politics part of contingent or strategic approach? I describe the origins of Chinese PMSCs in Africa and the participation of Chinese foreign policy to the Montreux and U.N. initiatives. First of all, I lay the background for the discussion by examining the expectations derived from the extant literature on China-Africa.

⁵⁹⁵ Cf. Preamble to Part III

⁵⁹⁶ Taylor and Williams 2004

⁵⁹⁷ Clapham 1996

Strategic interests have marked China's state-led economic cooperation.⁵⁹⁸ A vast economic influence creates the basis for a challenge of current balance of powers⁵⁹⁹ even if the Beijing consensus cannot aim to represent an alternative nor an indictment of Western views of development.⁶⁰⁰

The argument that the Chinese approach may undermine efforts to promote good governance and development has been mitigated by approaches that stress the multi-faceted nature of China-Africa relations.⁶⁰¹ Earlier developmental experiences offer alternative models⁶⁰² and the constructivist literature may indeed have neglected the voices and role of non-Western actors;⁶⁰³ ignoring that China led normative development in the past.⁶⁰⁴ Norms may be traced to the idea of non-interference and respect for sovereignty that has characterized the Chinese model in Africa.⁶⁰⁵ Large writes that: "From Premier Zhou Enlai's visit to Khartoum in 1964 to President Hu Jintao's visit in 2007, the Chinese foreign policy principles organized around sovereignty, territorial integrity and non-interference have endured at the level of political discourse."

At the same time, the account of Chinese activity that "recalls the patterns of empires of the past," as French wrote,⁶⁰⁶ is more than impressionistic. Chinese normative approaches have to contend with the problematic issue of human rights. Within the context of decolonization,

⁵⁹⁸ Taylor, Ian. "China's oil diplomacy in Africa." *International affairs* 82.5 (2006): 937-959.

⁵⁹⁹ Sanderson, Henry, and Michael Forsythe. *China's superbank: debt, oil and influence-how China Development Bank is rewriting the rules of finance*. John Wiley & Sons, 2012; Broadman, Harry G. *Africa's silk road: China and India's new economic frontier*. World Bank Publications, 2007.

⁶⁰⁰ Williamson, John. "Is the 'Beijing Consensus' Now Dominant?." *Asia Policy* 13.1 (2012): 1-16.

⁶⁰¹ Bräutigam, Op. Cit.; Alden, Chris, Daniel Large, and Ricardo Soares De Oliveira. *China returns to Africa: A rising power and a continent embrace*. New York: Columbia University Press, 2008. Rotberg, Robert I., ed. *China into Africa: Trade, aid, and influence*. Brookings Institution Press, 2009.

⁶⁰² On the strategies of the developmental model, cf. Bräutigam, 2009; Huang in Rotberg, Robert I., ed. *China into Africa: Trade, aid, and influence*. Brookings Institution Press, 2009.ch. 14

⁶⁰³ Acharya (2014). Part of the reason, he argues, has to do with its relatively narrow conceptualization of agency. On this point, also cf. Chabal, Patrick. *Africa: the politics of suffering and smiling*. Zed books, 2009.

⁶⁰⁴ Helleiner, Eric. "Southern Pioneers of International Development." *Global Governance* 20.3 (2014): 375-388.

⁶⁰⁵ Taylor in Harbeson and Rotchild, Op. Cit., 2013:298

⁶⁰⁶ French, Howard W. *China's second continent: How a million migrants are building a new empire in Africa*. Vintage, 2014. Migration, in his view, provides the most striking parallel with late Western imperialism

newly independent states embraced the very ‘right’ of self-determination as a human right. Besides even if a more minimalist, neutral interpretation in comparison with the grand visions of the past, human rights provides a moral approach and acts as an enabler of politics.⁶⁰⁷

Thus, this brief review of the literature on the engagement of China in Africa leads us to anticipate that as Chinese interests expand, a modest but growing engagement in regulatory cooperation on PMSCs will be pursued. On the one hand, Chinese businesses need PMSCs. On the other hand, engagement is modest by virtue of the fact that the complex regime that I have described in chapters three and four, is based on the human rights content of Montreux. I proceed to test these expectations by assessing the input to the Montreux initiative and the U.N. treaty.

9.4.1 Chinese participation to Montreux and the U.N. debates

The Chinese delegations had already participated to several of the debates on regulation when Chinese contractors entered Sudan in 2008. A post-conflict setting set the stage for partition and eventually the troubled birth of the continent’s newest independent country, the Republic of South Sudan.

China’s signing of the Montreux Document and the related liberalization of the market for security services were part of a set of liberalization policies undertaken in China. Between 2008 and 2010 the state reorganized both the supervisory role of the government for the domestic industry and opened the Chinese market to foreign firms that were previously excluded.⁶⁰⁸

⁶⁰⁷ Moyn, Samuel. *The last utopia*. Harvard University Press, 2010.

⁶⁰⁸ Catallo J. *China’s Managed Market for Force* in Dunigan, Molly, and Ulrich Petersohn, eds. *The Markets for Force: Privatization of Security Across*

In the realm of international regulatory cooperation, Chinese diplomacy proceeded in two ways. First, China actively participated to the discussions within the U.N. Human Rights Council that eventually produced the Draft Convention.⁶⁰⁹ In an emblematic statement the delegation acknowledged that “especially outside their respective home countries, there was a lack of effective regulation, accountability and monitoring and oversight mechanisms”.⁶¹⁰ Hence, China supported the proposal of an international treaty:

*National legislation was important, but could not be relied upon on its own, given that many PMSC activities were transboundary in nature. China (is) open to the idea of a legally binding international instrument, and expresses its support for more in-depth discussions on the issue of elaborating an international regulatory framework.*⁶¹¹

Secondly, Chinese officials participated to the “Swiss Initiative” process. However, they only joined the third and fourth meetings of experts. The engagement with a human rights initiative as early as 2006 when the first meeting took place may have been challenging to justify. The first two meetings had tackled what seemed to be a new problem in international affairs by way of trying to clarify the relevant bodies of humanitarian law and human rights law that

World Regions. University of Pennsylvania Press, 2015. As for the former, Catallo mentions the 2008 Ordinance on the Management of Security Services issued by the Legislative Affairs Office of the State Council; as for the latter, the Security Service Management Regulation Act of January 1 2010 (p.124)

⁶⁰⁹ Cf. chapter two

⁶¹⁰ A/HRC/22/41 2nd session (2012). Par. 70

⁶¹¹ Ibid.

would apply.

At the fourth and concluding meeting on the Swiss Initiative in Montreux on 15-17 September 2008, the Montreux Document was finalized and China was one of the participating governments that adopted it. Subsequently, China became increasingly involved in the Montreux Forum and stressed that the problem of Third Country Nationals should be included in MD.⁶¹²

The increased engagement with a human rights initiative may have been problematic but according to Na Jiang, regardless of whether China's current practices uphold the human rights standards, "China is gradually accepting the concept of human rights and is taking measures to fulfill its international human rights obligations. China also submits reports on human rights to UN treaty bodies, drafts new international human rights instruments, engages in numerous multilateral, regional and bilateral dialogues on human rights."⁶¹³

As I argued that anti-mercenary norms and human rights norms provide distinct and at times rival set of ideas for PMSCs governance, the influence of China in the process stands out. China's growing economic involvement in many African countries is not necessarily made to

⁶¹² Author's interviews, February 2015. On TCN, cf. chapter five

⁶¹³ Jiang, Na. *China and International Human Rights: Harsh Punishments in the Context of the International Covenant on Civil and Political Rights*. Springer Science & Business Media, 2013. He notes that China has participated in a number of UN proceedings on human rights and has ratified over 20 international human rights treaties, but not the *International Covenant on Civil and Political Rights* (ICCPR), even though it signed that agreement in 1998.

support and realize broad purposes implicit in the conceptualizations of democracy. As Harbeson writes:

*The extent to which they do, or do not, will in turn have an important bearing upon the extent to which sub-Saharan African countries uphold or undermine the strengthened and increasingly explicit international regimes undergirding democratic accountability, human rights, and the rule of law.*⁶¹⁴

⁶¹⁴ Harbeson and Rotchild, Op. Cit., P.86

Chapter 10

Future Research

I turn here to areas where there are still important research gaps and where regulatory politics invest in areas that go beyond what was covered by Montreux or the U.N. initiative in the previous chapters. The literature of private security contractors has developed in isolation from the developments in development and political economy and research overlooked the question of ownership of security companies. I study the rationales of the policy of nationalization in South Africa and show some of the risks of rent-seeking. I suggest that the proposed nationalization would not represent a unique or isolated case of limited ownership. Another area where gaps remain is domestic labor policy. My treatment of Third Country Nationals introduced the reader to aspects of domestic policy on labor condition but only Abrahamsen and Williams have described the nexus between labor policy and competition policy. I elaborate on their work and study how collective action in the private security industry a question both for policy and for political stability.

10.1 The disparities of Trade Dependence⁶¹⁵

⁶¹⁵ The expression belongs to Hirschman, *National Power and the Structure of Foreign Trade*. Berkeley: University of California Press, 1981

Why has South Africa repeatedly tried to nationalize foreign-owned security companies? Are there legitimate, developmental policy goals? Are there international standards that all states preferences should converge to?

In what follows, I examine the main arguments given by proponents and critics of nationalization. I attempt to cast a wider net on international standards and argue that the proposed expropriation would not lead to a unique case of limited ownership. Several countries- including USA, China, Brazil, Russia and Canada- have limited private security to nationals within those countries or placed severe limitations on foreign ownership.⁶¹⁶ Hence, there is no ‘international standard’ of legitimate ownership. Thus, trade arguments can actually be revealed to have some limits and represent instead, in Hirschman’s language, the articulation of the disparity of trade dependence.⁶¹⁷ I also review the little evidence that PMSCs represent a national security threat and review the legitimate concerns of rent-seeking strategies, which have notable precedents in the political economy of indigenization policies in Africa.⁶¹⁸

10.1.1 Background and Significance

⁶¹⁶ Author’s interviews, Geneva, July 2014

⁶¹⁷ An often cited review of legislation pertaining to foreign ownership in private security industries, in fourteen countries, mentions *that five of these countries (USA, China, Brazil, Russia and Canada) had limited private security to nationals within those countries and eight countries placed severe limitations on foreign ownership.*

⁶¹⁸ Lewis, Op. Cit., Pp.137-145. The author shows how a class of local entrepreneurs relied on illicit transactions and corruption in what amounted to Bhagwati, J. "Directly Unproductive Profit-Seeking Activities." *Journal of Political Economy* (1998). Krueger, Anne O. "The political economy of the rent-seeking society." *The American economic review* (1974): 291-303.

The limitations on foreign ownership refer to the PSiRA Bill or “Private Security Industry Regulation Amendment Bill” of 2012. Originally, the establishment of PSiRA, the Private Security Regulation Authority dates from 2005 and it replaced the more limited Security Officers Board whose history can be traced back into the apartheid years.

The persona of PSiRA was built from scratch as an “organization in authority” with symbols rooted in African history. The logo includes a lion and a shield, which stands for “craftsmanship and defensive weaponry in warfare”. It is an African shield and “it’s for all South Africans”. According to recent report, PSiRA oversees an industry with 1,953,605 registered security officers, which amounts to ten percent of the active population.⁶¹⁹

Before I proceed to trace and compare the arguments in the attempted nationalization of 2001 to the more recent on-going process (2012-15), I should note two points. First, expropriations across sectors around the world have become less frequent compared to the 1970s but the number of takings has risen again since the mid-1990s.⁶²⁰ Second, foreign firms are more vulnerable to expropriation in resource-based sectors, particularly in mining and petroleum to which the private security industry is closely associated. Governments break contracts and devalue foreign holdings through forced renegotiations, discriminatory policy changes, or other interference with foreign firms’ operations in actions known as creeping expropriation.⁶²¹ Thus, there is the concern that the government policy may reach beyond the security sector per se at the extractive industries.

10.1.2 Three arguments

⁶¹⁹ Data include active and non-active registered security officers registered with PSiRA (report 2012-13); Active population data is from the World Bank; 18,687,019 (<http://data.worldbank.org/indicator/SL.TLF.TOTL.IN>)

⁶²⁰ Wellhausen, Rachel L. "Investor-State Disputes When Can Governments Break Contracts?" *Journal of Conflict Resolution* (2013): 0022002713503299.

⁶²¹ Kobrin 1982

Abrahamsen and Williams noted that three arguments of national security, rent seeking and free trade figured in the policy debate on nationalization of 2001⁶²².

Over the recent years of negotiations and talks, the government has relied heavily on the argument of national security, as previously, but it also stressed the nature and scope of the industry, the technological advancements in the private security space, and developments since 9/11.⁶²³ Thus, similar arguments have appeared in the 2012-14 phase, but with relatively greater emphasis on the loss of sovereignty due to the debates around Third Country Nationals, shaped by the problems that South Africa encountered during the last decade. In 2001, this element was not part of the argument of national security; the government stating that that ‘the *connection that some of the actors in the private security companies have with foreign intelligence services and the similarity of objectives informed by their past co-operation in the Cold War era (...) makes them free agents to be exploited for espionage activities.*’⁶²⁴

The comparison shows as more continuity than change especially in use of the rent-seeking. First, the industry fears are the same: rent-seeking, political machinations, collusion with public officials. A leading lawyer for the industry argues that the nationalization would be a restricted sale to a selected few, and the ownership clause a downright confiscation.⁶²⁵ This echoes the perspective from 2001 that “this industry is perceived to be very profitable and that changes in ownership will benefit a politically connected elite”, as Abrahamsen and Williams noted.⁶²⁶

⁶²² Abrahamsen and Williams, Op. Cit, p. 77

⁶²³ Police Committee Meeting, 28th January 2014, <https://pmg.org.za/committee-meeting/16812/>, Last accessed 26th February 2015

⁶²⁴ Abrahamsen and Williams, Op. Cit, pp. 97-98

⁶²⁵ Author’s interviews, November 2014.

⁶²⁶ Key individuals behind the campaign also argued, probably with some justification, that the legislation was in part motivated by elements of the domestic security industry seeing an opportunity to see off competition and potentially pick up foreign owned companies at distressed prices. See Abrahamsen and Williams, ‘Privatisation, Globalisation and the Politics of Protection in South Africa’. Abrahamsen and Williams, Op. Cit. p. 121

The elitist nature of the governing party, a closely-knit group that fields most of the presidents, premiers, members of the cabinets and deputies that run the government⁶²⁷, is sometimes associated to this argument. Authors noted that rent seeking was common in several precedents of indigenization policies in Africa and the result was ‘Directly Unproductive Profit-Seeking Activities’.⁶²⁸

Secondly, trade liberalization politics have appeared more forcefully in the more recent policy development phase. One distinctive change is the existence of a new trade preference program, such as AGOA- where South Africa is the largest beneficiary. Politicians and think tanks have relied on trade arguments to protect existing ownership; they point to the obligations under General Agreement on Trade in Services of the World Trade Organization, or to the Protocol on Finance and Investment of the Southern African Development Community⁶²⁹.

The World Trade Organization includes private security in the General Agreement on Trade in Services and encourages member countries to allow free and fair competition in security services.⁶³⁰ Trade classification can thus pose as neutral and commentators argue that domestic compliance must follow from international classifications.⁶³¹ The key difference for trade

⁶²⁷ a ‘governing class’ of 42 people; (...) presidents, premiers, members of the cabinets and executive councils, parliamentarians and heads of civil service departments *Politics in Southern Africa*, Tom Lodge, p. 22.

⁶²⁸ Lewis, Op. Cit., Pp.137-145. The author shows how a class of local entrepreneurs relied on illicit transactions and corruption in what amounted to Bhagwati, J. "Directly Unproductive Profit-Seeking Activities." *Journal of Political Economy* (1998). Krueger, Anne O. "The political economy of the rent-seeking society." *The American economic review* (1974): 291-303.

⁶²⁹ The main think-tank involved in the trade debate was TRALAC. Cf. <http://www.tralac.org/discussions/article/5715-the-regulation-of-private-security-firms-in-south-africa-what-are-the-governance-signals.html> and <http://www.tralac.org/discussions/article/5590-south-africa-s-private-security-industry-amendment-bill-and-the-sadc-protocol-on-finance-and-investment.html>

⁶³⁰ Abrahamsen and Williams provide the example of China’s decision to open its security market to foreign investment in advance of the 2008 Olympic Games was partly in response to WTO requirements. *The EU has also sought to promote free trade in security services across Europe as part of its Services Directive, although the Europe-wide security industry association Confederation of European Security Services (CoESS) has contested this, arguing that with over twenty different criminal justices systems a genuine internal market is impossible and that a lack of regulation in some member states will give companies originating there an unfair competitive advantage over those imposing more stringent rules*

⁶³¹ See for example the work of TRALAC. “This definition corresponds to the definition of security services and security activities regulated in the Act. Consequently, any regulation on the private security industry must therefore adhere to South Africa’s GATS commitments”.

arguments has been the greater reliance on business expectations and climate, and the use of argument associated to the African Growth and Opportunity Act (AGOA) negotiations⁶³². I return to this trade agreement below- in the section ‘Sources of international leverage: AGOA negotiations as a focal point’.

It is notable that the PSiRA amendment bill challenged the established procedures. A Green Paper generally originates in the department of the Ministry concerned and is published for feedback. A submission date is usually given for input from civil society. Then, the document forms then the basis for a White Paper that is a broad statement of government policy.

Instead, the process proceeded in two stages and only in the second one, the government commissioned studies and requested advice.⁶³³ The government presented a first version of the Private Security Industry Regulation Amendment Bill⁶³⁴, introducing it to the Police Committee on Police in the Parliament on the 30th October 2012. In an instrumentalization of the reform process, the government decided the general strategy first and only later requested the advice of the Department of Trade and Industry. Confronted with the risk of international arbitration or the renegotiation of trade treaties, the research department was asked to look for evidence on the track record of foreign-owned security companies, such as G4S. Yet, no evidence was found to support the claim that foreigners were an actual obstacle to

<http://www.tralac.org/discussions/article/5347-a-gats-perspective-on-south-africa-s-private-security-industry-regulation-amendment-bill.html>

⁶³² “South Africa is, in the three months to March 2014, the largest beneficiary of AGOA preferences and also has the most diversified export palette with respect to US exports. It remains important to understand the broader context and background to South Africa’s AGOA status when looking at the proposed legislation, which would place restrictions on the foreign ownership of investments and assets relating to the South African security industry”

⁶³³ Author’s interviews, July 2014

⁶³⁴ Minister of Police Nathi Mthethwa (ANC); May 9, 2012

oversight and accountability,⁶³⁵ an element that would have strengthened the national security argument.

Successful reform requires autonomy from interests opposed to reform for decision makers to conceive and design reform programs.⁶³⁶ In this case, the government insulated itself by operating through a strategy of obfuscation, somewhat akin to the design and management of the public sector reform policies in Sub-Saharan Africa- the politics of *obfuscation, ambiguity and indirection*⁶³⁷. This was not new. First, the 1998 Act was already a strong attempt at reining in political authority with obfuscation. According to Malas and Cilliers, subverted parliamentary oversight and accorded Minister Asmal extensive discretionary powers. This extraordinary power, they claimed, is *more reminiscent of the apartheid era, than of Mandela's Government*. Second, when the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act was created in 2006, the consideration of the Bill by Parliament was characterized by high international interest and submissions by various foreign private security companies, non-governmental organizations and civil society⁶³⁸ but participation was hampered by a lack of transparency and feedback. The industry was not able to provide input, according to the head of domestic business association⁶³⁹ and international firms claimed the government was secretive about its content.⁶⁴⁰

⁶³⁵ Author's interviews, July 2014

⁶³⁶ The reference work is of course Evans, Peter B. *Embedded autonomy: states and industrial transformation*. Vol. 25. Princeton, NJ: Princeton University Press, 1995. Also, cf. Van de Walle, Op. Cit., pp.44-45, 'On the autonomy of the African state'.

⁶³⁷ I refer to several works that have used this concept in the past, cited in Van de Walle, Op. Cit., p.37. Herbst, 'The Politics of Reform in Ghana, 1982-1991'; Thomas M. Callaghy, "Lost between State and Market: The Politics of Economic Adjustment in Ghana, Zambia and Nigeria" in Joan Nelson (ed.), *Economic Crisis and Policy Choice*; Samba Ka and Nicholas Van de Walle, 'The Political Economy of Structural Adjustment in Senegal, 1980-1991,' in Stephan Haggard and Steven B. Webb (eds.) *Voting for Reform: Economic Adjustment in new Democracies*, pp.290-359; West, "The Politics of Implementation of Structural Adjustment in Zambia" and Peter Lewis, *The Political Economy of Public Enterprise in Nigeria*.

⁶³⁸ *Submissions to the Portfolio Committee of Defence on the Bill introduced in Parliament focused on issues such as the affect of the Bill on the constitutional right to the freedom of trade, occupation and profession; retrospectivity; an exemption in the Bill in respect of freedom struggles (not included expressly in the new Act); the fact that the Bill addressed the regulation of humanitarian aid; enlistment in foreign armed forces; and private security services.* Jacobs 2008:71

⁶³⁹ Interview, April 2014

⁶⁴⁰ Brooks, D., *The Cape Times*, 27 September, 2005

10.1.3 Sources of international leverage and the AGOA negotiations

However, the use of trade related arguments had a new source of international leverage, as this section describes.

Property rights are entrenched in the South African Constitution.⁶⁴¹ Petersen writes that: “international treaties concluded by South Africa . . . may have extended even greater protection for (foreign-owned) property against government interference and incursion, and without benefit of any meaningful public debate or scrutiny of such a move.”⁶⁴²

SIA and the United States were not alone in the use of trade related arguments: the Scandinavian and UK governments also relied on the same premises. In the latter case, the South African Government was warned that it would contravene the bilateral investment treaty between the two countries.

Given the large investments held in the security sector by foreign firms, notably American firms, there has been a stronger backlash against expropriation from the United States. I shall illustrate with a few examples. First, the Security Industry Association (SIA) is a U.S. based advocacy organization, whose stated aim is to advocate for pro-industry policies and legislation. The organization has used trade arguments focused on AGOA. SIA wrote to the

⁶⁴¹ Not without controversy, according to A.J. van der Walt and G.J. Piennar, *Introduction to the Law of Property*, 4th ed., Juta & Co. Ltd, 2002, at pg.343 in Peterson (2006) *South Africa's Bilateral Investment Treaties. Implications for Development and Human Rights*

⁶⁴² Treaty violation and fear of unemployment are the two arguments used. Democratic Alliance, Press Release, 5 March 2014. Cf. <http://allafrica.com/stories/201403050831.html>

chairman of the Senate's finance committee, and protested the South African government's proposed legislation. South Africa would be in contravention of international trade obligations, SIA claimed. Specifically, AGOA requires eligible countries to provide evidence that they are meeting, or attempting to meet, the Act's eligibility requirements, including "the elimination of barriers to United States trade and investment, including...the provision of national treatment and measures to create an environment conducive to domestic and foreign investment".⁶⁴³ In response, a U.S. Senator stated at the Finance Hearing on the AGOA: "South Africa is undertaking a number of policies that undermine investor confidence. These include a Draft Intellectual Property Policy that erodes some IP protections and security services legislation that would contravene South Africa's international trade commitments".⁶⁴⁴

In the 2012-2015, politics of trade agreements shaped the political debate over foreign ownership in the private security industry making Abrahmsen and Williams' intuition on the earlier experience resonate once more:

*principles of free trade related to a specifically depoliticized vision of security successfully trumped concerns for national security and calls for the protection of domestic industry. By embedding security privatization in broader global norms connected to processes of commodification and responsabilization, the home states of the foreign companies were able to intercede on their behalf by using commercial arguments and forms of market-norm coercion, skirting the much more sensitive and difficult ground of 'national security' policy.*⁶⁴⁵

⁶⁴³ <http://www.siaonline.org/SiteAssets/GovernmentRelations/Letters%20To%20Con/Security%20Industry%20Association%20AGOA%20Wyden-Hatch.pdf>

⁶⁴⁴ cf. letter to South African Ambassador; appendix B

⁶⁴⁵ Abrahmsen and Williams, Op. Cit. p. 100

10.2 Labor policy

In chapter four, I noted the conspicuous absence of trade unions in the process of creation of the Montreux standards. Standards in labor policy are notable for two reasons: the first is the concern for equity; the second is that in this labor-intensive industry mobilization can be violent- and has indeed been so. Further, wages are fundamental to analysis of political economy because they affect the nature of market competition and the sources of competitive advantage. Hence I argue that it is going to be an important area for future research.

A democratic governance of the sector that accounts for the relevance of private security unions is relevant for several reasons, not least their capacity to mobilize and protest. Unions are often portrayed as ineffective and lacking capacity. However, they have shown to be able to paralyze entire sections of the economy by calling strikes, including armed strikes. A strike by security guards in 2006 supported by the *South African Transport and Allied Workers Union* and 15 other trade unions lasted more than three months. It was particularly violent and deserved a parliamentary session.⁶⁴⁶ The fact that security guards are both able to get access to weapons and legally permitted to strike,⁶⁴⁷ can be a powerful- and perilous- additional tool for mobilization and advocacy, augmenting the capacity of an organized group. In several countries, security guards are both able to get access to weapons *and* legally permitted to strike. The result is that there are simply no global standards.

⁶⁴⁶ “Breaking windows, breaking up cars, looting. And very, very worrying too are these reports - I do not know if they are correct - of people being thrown out of trains “ PROCEEDINGS OF THE NATIONAL ASSEMBLY, THURSDAY, 18 MAY 2006, <http://www.dfa.gov.za/docs/2006pq/pqp12.htm> Last accessed September 2014 . A more recent example of long-term coordination capacity is the six-months strike in the platinum industry. The Association of Mineworkers and Construction Union (AMCU) reached deals to that salaries will rise by around 1,000 rand a month each year until 2017. Cf. <http://www.bbc.com/news/business-27996445>

⁶⁴⁷ Note that in some countries the right to strikes is regulated so that police and private security personnel are not permitted to become members of a trade union (e.g. Turkey). More research may be needed on this point

10.2.1 Drivers of mobilization and of violent action

The simple observation that security guards are both able to get access to weapons and legally permitted to strike makes collective action of workers in the private security industry a question both for policy and for political stability.

The first question is what shapes collective action. Recent data on strikes shows that mobilization is spurred by grievances due to minimum wage violation⁶⁴⁸. A study of the determinants of non-compliance in South Africa shows that across several sectors, violations in the security sector are the highest with estimates of nearly 70 per cent.⁶⁴⁹

A related question is what are the mechanisms of collective action and their effectiveness. Are unions able to represent workers? Research has shown that loss of leadership that caused a huge decline in capacity⁶⁵⁰ when COSATU leaders were nominated by the ANC to run for parliament in 1994. Some mention the growing gap between bureaucratized leadership and rank and file worker, the decline of quality of service offered, and the reconfiguration of the alliance, with the ANC effective at wielding state patronage.⁶⁵¹ In general, the union movement never succeeded in penetrating the poorest sectors of the workforce- farmworkers, domestic workers, and the informal sector⁶⁵² and private security unions cater to low pay security guards.

⁶⁴⁸ Bhorat, Haroon, Ravi Kanbur, and Natasha Mayet. "Minimum wage violation in South Africa." *International Labour Review* 151.3 (2012): 277-287. 45% of covered workers get paid wages below the legislated minimum, whilst the average depth of shortfall is 36% of the minimum wage. Around this average, violation is most prevalent in the Security, Forestry and Farming Sectors.

⁶⁴⁹ Bhorat, Haroon, Ravi Kanbur, and Natasha Mayet. "The determinants of minimum wage violation in South Africa." *Charles H. Dyson School WP* 5 (2011). The results suggest that there are a variety of factors impacting on violation, including firm-level, sectoral and spatial characteristics. One of the key determinants of violation is found to be the local unemployment rate

⁶⁵⁰ Buhlungu 2005, 711 in Freunde 2007

⁶⁵¹ Adler and Webster 2000:14

⁶⁵² Freunde 2007

Against this wisdom, however, McCallum argued that private security unions have obtained remarkable successes⁶⁵³ with international solidarity chain. South African and Indian organized labor, McCallum claimed, were part of a global campaign managed to win new rights for hundreds of thousands of security guards around the world⁶⁵⁴.

10.2.2 Contingency

Changes in minimum wage policy can affect standards broadly defined. Abrahmsen and Williams showed that a transnational labor campaign against G4S changed the symbolic power and legitimacy of public-private assemblages. The controversy started with unions campaigning against a global giant driving down wages and standards and focused on unfair dismissals, denials of union rights and failure to comply with minimum wage conditions. The case was resolved by an OECD mediator that actually “set the standard of appropriate, effective and legitimate actions for states, companies, groups and individuals” because G4S sought to turn the concessions into a victory and a form of symbolic capital.⁶⁵⁵ The authors argue that this could be read as a liberal story of spreading global norms but warn against the uncertainties of political authority in fragile contexts and the ambiguous symbolic power of security.

⁶⁵³ McCallum, Jamie K. *Global unions, local power: the new spirit of transnational labor organizing*. Cornell University Press, 2013. The South African trade union SATAWU began collaborating with UNI, Union Network International, an international trade union organization, when the latter needed partners for its global campaign against G4S.

⁶⁵⁴ McCallum, Jamie K. *Global unions, local power: the new spirit of transnational labor organizing*. Cornell University Press, 2013. The South African trade union SATAWU began collaborating with UNI, Union Network International, an international trade union organization, when the latter needed partners for its global campaign against G4S.

⁶⁵⁵ Abrahmsen and Williams, Op. Cit, p.230

My research in Sierra Leone supports these results with a minor caveat. Minimum wage laws can affect the labor price and alter the competitive balance between PMSCs; where labor is a relatively high part of the costs, this is important. Yet, as opposed to the case described by Abrahmsen and Williams, in the context of an emergency or crisis, the possibility of a mobilization for or against policy change is greatly diminished.⁶⁵⁶

In the pre-Ebola days of 2014, the government decided to change the minimum wage policy to Le 500'000. It meant a 50% net increase in take home pay. The policy change was introduced in 2014 and timing is of the essence. The policy change was drafted during the boom created by the upswing in iron ore mining but by the time it became law, the commodity super-cycle had ended and Ebola had arrived.⁶⁵⁷

Large firms were opposed the bill fearing a competitive disadvantage. They expected asymmetrical cost increases because smaller firms, relying on lack of enforcement, would not increase their wages. Thus, small firms arguably drove a "race to the bottom" of wages and standards.

This policy choice has a precedent in Africa, in 2003, in Kenya.⁶⁵⁸ In that context, a bill introduced the increase in the minimum wage of 12.5% and divided companies into two blocs, one in favor and one against. However, there are some important differences between the two cases. First, in Kenya, there was actually mobilization against the minimum wage change, which in Sierra Leone did not occur. Certainly, scale is a factor- Sierra Leone's economy is smaller in comparison to Kenya and less sophisticated in terms of industrial representation.

⁶⁵⁶ need to specify assumptions on capacity to mobilize

⁶⁵⁷ Authors' interviews, September 2015, Freetown

⁶⁵⁸ I draw on Abrahmsen and Williams, Op. Cit.

Further, mobilization was arguably impossible because of the national emergency. Large firms, like G4S, for example, did not endorse the bill and criticize both the timing and the lack of enforcement, but they remained committed to complying with national laws.⁶⁵⁹

A second difference is that small firms in the Kenyan context led an opposition to minimum wage. The firms that opposed the bill broke away and formed a second industry association of some thirty firms; they went on to ignore the rules and there was no sign the government tried to enforce them.

This part of my study confirms an Abrahamsen and Williams' results. Labor policy can affect the labor price and alter the competitive balance. In the private security sector, where labor is a relatively high part of the costs, this is significant. At the same time, contingency can impede the possibility of a negotiated policy dialogue.

⁶⁵⁹ Authors' interviews, September 2015, Freetown

Conclusion

This chapter presents a synthesis of the discussions in the preceding chapters. I shall emphasize five points in particular.

First, regime formation depends upon global norms and interests, and particularly, state choices towards the Montreux Document, the only tool to account for new networks and relations between states and markets and the only instrument to address the concern that PMSCs operate in a legal vacuum. I argued that the tractability of this issue-area largely consists in facilitating the acceptance of the term PMSC, the invention of which is akin to a ‘permanent inherited patronym’.

Second, regime formation is weaved in a texture of global and domestic choices driven by broad social norms. State interests as well as contingencies are only one of the determinants of state choices and are an insufficient explanatory variable. Conventional theories that claim that global issues and policies reflect the underlying military and economic capabilities are insufficient to explain state choices, since these theories don’t allow for a distinction between strategy and contingency. They are also unable to account for international factors – the role of the United Nations and the International Committee of the Red Cross, or the role of Switzerland as an actor and originator of the Montreux process – a decision that led to important insights about the interplay of interests, ideas, and institutions. Yet, constructivist approaches are also challenged because assuming the existence of PMSCs norms would be simplistic. These norms are in an early stage of formation and cannot be said to be determinants of state behavior nor can they be shown to be global and proscriptive social norms. Borrowing Finnemore and Sikkink’s three categories for norm diffusion, PMSCs

norms are still in the first stage of emergence. The universality of PMSC norms is still aspirational. This fits, however, with the branch of regime theory that stresses how reaching an agreement is a stage in the negotiation, not the end of the process.

Regime formation built upon the Swiss initiative but state choices on PMSCs bear upon the varying influence of broader norms, such as the anti-mercenary norm. As Percy recalls, the Swiss turned their backs on their mercenary past in 1848 by outlawing the long Swiss tradition of exporting mercenaries.⁶⁶⁰

Which broad social norms shape change? On the one hand, the neo-liberal norm stirs greater unconstrained use of private security- with increased contracting also depending upon concurring factors- i.e. the increased Western unwillingness to intervene and changes in the availability of military supplies and personnel. On the other hand, the norm against mercenary use has historically constrained or restrained states' choices in deciding whether or not to use private force, or how to compose the armies. In contemporary contexts of late state development, the influence of the anti-mercenary norm remains higher but varying.

Fourth, in my empirical investigation at the state level, I proceeded to assess the role of social norms. In the time period under study, electoral politics and political entrepreneurs were able to stir the anti-mercenary norm, in a context where African states either use or warrant the use of private security within their borders, but mostly ignore the Montreux Document.

A tension between neoliberal and anti-mercenary norm can be appreciated both in South Africa and Nigeria.

⁶⁶⁰ Percy, *Op. Cit.*, p.246

A chain of events started with the U.S. government policy decision to recruit foreign employees, driven by the unique dynamics of the Iraq conflict. The recruitment strengthened the anti-mercenary norm in certain locations. In South Africa, recruitment coincided with the attempted coup in Equatorial Guinea fielded by South Africans, which unfolded in the midst of South Africa's third democratic election campaign- further bolstering the anti-mercenary norm, and largely driving South Africa's engagement in international regulation.

Describing the anti-mercenary norm in the context of Nigeria's engagement, I found two related aspects. First, the increase in threat level, contingent to the decreased accessibility of military aid, led policymakers to adopt PMSCs. In that specific milieu, state choices were driven neither by neo-liberalism nor by strategy but rather by contingency- i.e. the acceleration in non-state actors' lethality and the related kidnapping, associated with the January election.

Nigerian policymakers, not unlike U.S. policymakers after 9/11 or the French ones after the Paris attacks of 2015,⁶⁶¹ have turned to contracting core functions to the market. Faced with increased threats, states initially harness the resources and capacity of the private sector.

Second, the rapprochement towards Montreux is driven by the anti-mercenary norm; state choices towards private security were not shaped by the neo-liberal norm. The chapter indicates the relevance of state choices: Nigerian foreign policy had never participated in Montreux events nor in U.N. sessions on private security. Now, almost a decade after the start of the Swiss initiative, there is an indication of change in the role of the anti-mercenary norm in shaping Nigeria's regulatory politics. 'Varieties of contracting' approaches suggest that commercialization comes first, followed by regulation. Yet, continuity and change also depend

⁶⁶¹ Correspondance with Roland Marchal, December 2015. Cf. F. Ocqueteau, forthcoming

upon the varying influence and competition between the neoliberal norm and the anti-mercenary norm.

Finally, the comparison of Sierra Leone and Liberia highlighted further aspects of state choice and regime construction, not necessarily reflecting changes in social norms. In these contexts, dated perceptions, assumptions and second-hand accounts could have stirred the anti-mercenary norm but it did not happen.

I noted that the policy choice of privatizing the Army has been described as *fortuitous* in Liberia but the security sector is still poorly regulated and the endorsement of the Montreux Document should be advocated and pursued. An ambiguity remains at the heart of this context- i.e. it is the only country whose army was built by private security and yet, it does not endorse Montreux nor PMSCs norms.

In Sierra Leone, the national legislation is recognized as a source of practice for Montreux. Most importantly, I provide fresh evidence on public-private assemblages during crisis by researching the public-private nexus during the Ebola epidemic. Against some of the prevailing literature, I suggest that in a *territorial* state, during a post-disaster setting, the state remains in charge, and there is not necessarily a boom in private security.

The fifth and last point is that African states have greater agency than expected. First, South Africa alternated between leadership, collaboration and criticism. In Nigeria, an engagement with regulatory cooperation represents a reversal of long-standing position. The agency of states can be clearly traced in post-conflict contexts like Sierra Leone and to a lower degree, Liberia, with distinctive contributions to prospective regulatory efforts.

What does state agency reveal? It suggests that in spite of increased interconnectedness, due to changes in technology, states are far from irrelevant. Abrahamsen and Williams wrote that the state's monopoly of legitimate force is increasingly "enmeshed in networks and relations that cannot be contained within the boundaries of the national state", but states eventually establish ownership of the shifts in the boundaries between market and state. In fact, the general wisdom in the political economy of development is that domestic rulers generally hold the final and critical role in encouraging or inhibiting market arrangements⁶⁶². This conclusion finds substantiation in my work but domestic rulers' agency crucially depends upon a two-level game and the international agreement on identification- i.e. PMSC as an inherited patronym. The international influence of strong states, can either directly drive regime creation or indirectly suppress it.

Finally, this research does not justify or endorse the increased use of private security but it comes strongly in support of further recognition of PMSC as an internationally assigned acronym indispensable for accountability and regime construction. At the global level, attitudes towards PMSCs norms remain at the stage of a developing practice. There is a lingering concern on TCNs- an issue that by itself can heighten the anti-mercenary norm and could be at the center of a future *Montreux +10*. Foreign enlistment was never considered problematic in the inter-state system due to the fact that neutrality laws have never banned foreign recruitment- the purpose of the neutrality laws was to prohibit the commission of

⁶⁶² In the political economy of development, account on the variations in the character of state interaction with market actors are covered in a wide literature that often include analysis of economies of East Asia. Cf. Wade, Robert. *Governing the market: Economic theory and the role of government in East Asian industrialization*. Princeton University Press, 1990. Evans, Peter B. *Embedded autonomy: states and industrial transformation*. Vol. 25. Princeton, NJ: Princeton University Press, 1995. On how predatory states undermine institutions: Reno, William. *Warlord politics and African states*. Lynne Rienner Publishers, 1999.

unauthorized acts of war by individuals *within* their countries- but it can be considered problematic by some states. The extent to which concerns on TCNs increase is going to be the pivotal to the direction of PMSCs norms.

I argue that continued involvement of the governments of the United States and China is indispensable. Noting the growing Chinese engagement in regime formation on PMSCs, both with the input to the Montreux initiative and to the U.N. treaty, their engagement has been unassertive by virtue of the fact that the complex regime is based on the human rights content of Montreux. Strong states must continue to promote a regularized dialogue among signatories, continue to assign the patronym of PMSCs to firms- regardless of how they define themselves- and engage in advocacy for norm promotion.

At the time of writing, after a time of scaling back a return to greater use of private security is again associated with extremism in Africa and instability in the Middle East. From Nigeria to Yemen, PMSCs contribute to the composition of armies, which directly or indirectly participate in conflicts. In such contexts of late state development where conflict is re-emerging, the norm against mercenary use constrains both international intervention and domestic state policy in deciding whether or not to use private force, how to compose their armies, and whether to regulate PMSCs. The international intervention is hampered by the anti-mercenary norm; the absence of mention of the use of contractors in implementing the strategy to destroy the Islamic State suggests a continuation of this trend. Domestic policy is reliant on contingent and ambiguous reactions to increased threats, initially using the resources and capacity of the private sector.

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APPENDICES

APPENDIX A

Participating States of the Montreux Document

1. Afghanistan
2. Angola
3. Australia
4. Austria
5. Canada
6. China
7. France
8. Germany
9. Iraq
10. Poland
11. Sierra Leone
12. South Africa
13. Sweden
14. Switzerland
15. United Kingdom
16. Ukraine
17. United States of America
18. Former Yugoslav Republic of Macedonia (3 February 2009)
19. Ecuador (12 February 2009)
20. Albania (17 February 2009)
21. Netherlands (20 February 2009)
22. Bosnia and Herzegovina (9 March 2009)
23. Greece (13 March 2009)
24. Portugal (27 March 2009)
25. Chile (06 Avril 2009)
26. Uruguay (22 Avril 2009)
27. Liechtenstein (27 Avril 2009)
28. Qatar (30 Avril 2009)
29. Jordan (18 May 2009)
30. Spain (20 May 2009)
31. Italy (15 June 2009)
32. Uganda (23.07.2009)
33. Cyprus (29.09.2009)

34. Georgia (22.10.2009)
35. Denmark (09.08.2010)
36. Hungary (01.02.2011)
37. Costa Rica (25.10.2011)
38. Finland (25.11.2011)
39. Belgium (28.02.2012)
40. Norway (08.06.2012)
41. Lithuania (13.06.2012)
42. Slovenia (24.07.2012)
43. Iceland (22.10.2012)
44. Bulgaria (08.01.2013)
45. Kuwait (02.05.2013)
46. Croatia (22.05.2013)
47. New Zealand (14.10.2013)
48. Czech Republic (14.11.2013)
49. Luxembourg (27.11.2013)
50. Japan (6.2.2014)
51. Ireland (13.11.2014)
52. Monaco (01.04.2015)
53. Madagascar (18.06.2015)

APPENDIX B: Letter

RON WYDEN, OREGON, CHAIRMAN
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
CHARLES E. SCHUMER, NEW YORK
DEBBIE STABENOW, MICHIGAN
MARIA CANTWELL, WASHINGTON
BILL NELSON, FLORIDA
ROBERT MENENDEZ, NEW JERSEY
THOMAS R. CARPER, DELAWARE
BENJAMIN L. CARDIN, MARYLAND
SHERROD BROWN, OHIO
MICHAEL F. BENNET, COLORADO
ROBERT F. CASEY, JR., PENNSYLVANIA
MARK R. WARNER, VIRGINIA
JOSHUA SHERKMAN, STAFF DIRECTOR
CHRIS CAMPBELL, REPUBLICAN STAFF DIRECTOR

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

June 23, 2014

H.E. Ebrahim Rasool
Ambassador
Embassy of South Africa
3051 Massachusetts Ave., NW
Washington, D.C. 20008

Dear Mr. Ambassador,

I am writing to express my concerns about several trade-restrictive measures in South Africa that have been brought to my attention. These include recent actions to restrict foreign direct investment, erode intellectual property rights protections, and delay implementation of the World Trade Organization (WTO) Trade Facilitation Agreement. These steps suggest that South Africa is increasingly moving away from full participation in the global economy. Such actions not only affects U.S. companies doing business in South Africa, but also imperils the economic growth of South Africa and that of the rest of sub-Saharan Africa. I am writing to ask that you and your government work to revise these trade-restrictive measures in the interest of stronger U.S.-South African trade and investment ties and broader engagement with the global economy.

I am concerned by reports that South Africa has passed legislation that would require security services companies operating in South Africa to be majority owned by South African entities. Companies that are not majority owned by South African companies would be required by the Private Security Industry Regulation Amendment Bill to divest ownership to South African companies. This legislation contravenes South Africa's international trade commitments, and would negatively affect other companies' future investment decisions. I understand the legislation has yet to be signed by President Zuma. I urge South Africa to reconsider this legislation, and to instead focus on promoting investment in South Africa.

Unfortunately, the security services legislation appears to be part of a broader effort to deter international investment in South Africa. The recent decision by South Africa to terminate bilateral investment treaties, and certain elements of the 2013 Promotion and Protection of Investment Bill, threaten to reduce legal protections for investors in South Africa. Over the past 20 years, South Africa has greatly benefited from manufacturing and services investors viewing South Africa as a stable environment in sub-Saharan Africa, and I believe maintaining non-discriminatory legal protections for investments is an essential element for allowing international investment to continue.

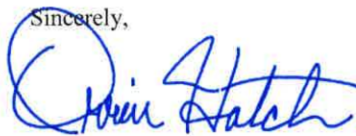
Similarly, I have strong concerns about the recent Draft Intellectual Property Policy. While in some respects the policy is a step towards more adequate protection of intellectual property rights, the policy also contains some serious shortcomings. For example, the Draft Policy fails to propose adequate regulatory data protection for innovative pharmaceuticals, and

proposes the inappropriate use of compulsory licensing. I believe these policies, contrary to their intent, would harm access to medicines by inhibiting investment in and development of new, innovative medicines in South Africa. The Draft Policy also indicates that compliance with international standards for copyright protection will reduce access to knowledge-related products; rather, the creation of knowledge-related products is dependent on strong legal protection.

Moreover, despite increased intellectual property enforcement efforts, South Africa continues to suffer from counterfeiting and piracy, and remains a transit point for counterfeit goods destined for neighboring countries. I encourage South Africa to further develop its Draft Intellectual Property Policy to create the appropriate incentives to attract investment in and foster development of innovative products and services.

I am also troubled by reports that the African Group has proposed delaying implementation of the WTO Trade Facilitation Agreement by trying to stop the agreement's entry into force until conclusion of the Doha round. I support conclusion of the Doha round under a post-Bali work plan that will lead to balanced outcomes across agricultural and non-agricultural market access and services. But there is no legal justification for delaying implementation of the Trade Facilitation Agreement, nor is there a sound basis in policy. The Trade Facilitation Agreement is the most significant step the WTO has taken since the conclusion of the Uruguay round towards boosting trade, growth, and development. As WTO Director-General Azevêdo recently said about the agreement, the United States, South Africa, and the rest of the WTO Membership worked hard to build the bridge, and it is now time to cross the bridge and implement the agreement. South Africa is a leader within the African Group and I expect that South Africa will play a more constructive role in Trade Facilitation Agreement implementation.

Congress has begun work on renewal of the African Growth and Opportunity Act, an effort I strongly support. South Africa's recent movement away from participation in the global economy and violations of its international trade commitments severely complicates that task. As you are aware, many members of Congress have questioned why unilateral preference programs that seek to encourage greater participation in the global economy should continue for countries that take domestic measures to disrupt international trade and investment. I hope that you and your government will engage constructively with the U.S. government towards resolving those concerns, and I look forward to working with you toward that goal.

Sincerely,


Orrin Hatch
Ranking Member

APPENDIX C: List of Main Interviews

Available with the author

Author Curriculum Vitae

Before joining the PhD program, I led the teams of MSF- Doctors Without Borders in Africa, Asia and the Middle East. I led the design and implementation of projects in Ebola-hit region for the World Bank. I graduated from the Navy Academy of Livorno with the rank of first lieutenant. With the Italian Navy, I led Search and Rescue operations in the Southern Mediterranean Sea for immigrants, refugees and seafarers. I held fellowships at Yale University (Department of Political Science) and Harvard University (Government department); and a teaching fellowship at Harvard Kennedy School. I hold a M.A. (Laurea) - Political Science; Università di Torino and a B.Sc.- Economics (Hons) from the London School of Economics.